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The Tragedy of Central European University: Theorizing Hungarian Illiberal Democracy and Its Threat to Academic Freedom

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Note

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JESSICA M. ZACCAGNINO

The global proliferation of radical right political movements and the decline of democracy are defining features of our current moment. Authoritarian leaders ascend to power through the ballot box, but at once, they systematically consolidate control over the state and civil society. Hungarian Prime Minister Viktor Orbán and the Fidesz party is emblematic of illiberal democracy, a term originally coined by Fareed Zakaria. This Note applies Zakaria's illiberal democracy to Hungary while adjusting the contours of his theory to better account for the role of anti-intellectualism and nationalism in the illiberal toolkit. This Note also investigates the Orbán government's targeting of Central European University, one of the most notorious struggles between a university and an illiberal democracy for academic freedom. Central European University's situation illuminates the ways in which illiberal régimes attempt to smother spaces of resistance, using ethno-nationalist rhetoric to characterize universities and intellectuals as outsider threats to the illiberal nation-state.

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The Tragedy of Central European University: Theorizing Hungarian Illiberal Democracy and Its Threat to Academic Freedom

JESSICA M. ZACCAGNINO *

Every age has its own Fascism, and we see the warning signs wherever the concentration of power denies citizens the possibility and the means of expressing and acting on their own free will.

Ogni tempo ha il suo fascismo: se ne notano i segni premonitori dovunque la contrenrazione di potere nega al cittadino la possibilità e la capacità di esprimere ed attuare la sua volontà.

—Primo Levi¹

INTRODUCTION

Far-right political parties have grown their influence globally by winning major, divisive elections in both recently democratized states and states that have long been considered cornerstones of liberal democracy.² Many of these parties emerged as a reaction to international unrest, including sweeping recessions and refugee crises. Guided by nationalism and populism, the far-right has shaken democracy to its core. Political parties such as Hungary's Fidesz and Jobbik, Poland's Law and Justice,

* University of Connecticut School of Law, LL.M. Candidate, Human Rights & Social Justice; University of Connecticut School of Law, J.D. 2020; Bard College, B.A. 2017. I am incredibly grateful to my advisor, Professor Kiel Brennan-Marquez, without whom I could not have properly theorized this Note. I would also like to thank Professor Michael Fischl for his invaluable advice throughout the drafting process. I am forever indebted to the editors of the *Connecticut Law Review*, and like to thank Jillian Chambers, Hannah Kalichman, Adam Kuegler, Alexandria Madjeric, Carolyn Rennie, and Mallori Thompson in particular for their meticulous work, extraordinarily helpful feedback, and friendship. Most importantly, I would like to thank my parents (Debra and Robert Zaccagnino), grandparents (Anne and Robert Blackburn), sister (Melissa Zaccagnino), and partner (James Ninia) for their never-ending support.

¹ PRIMO LEVI, *A Past We Thought Would Never Return*, in *THE BLACK HOLE OF AUSCHWITZ* 31, 34 (Marco Belpoliti ed., Sharon Wood trans., 2005); PRIMO LEVI, *Un passato che credevamo non dovesse ritornare più*, in *L'ASIMMETRIA E LA VITA: ARTICOLI E SAGGI 1955-1987*, at 47, 50 (Marco Belpoliti ed., 2002).

² See, e.g., *Europe and Right-Wing Nationalism: A Country-By-Country Guide*, BBC (Nov. 13, 2019), <https://www.bbc.com/news/world-europe-36130006> (surveying electoral gains made by far-right parties in Europe).

and Italy's Lega Nord have quickly risen to prominence.³ Likewise, far-right heads of government—including Donald Trump in the United States of America, Viktor Orbán in Hungary, and Recep Tayyip Erdoğan in Turkey—have swiftly gained power and begun to curb safeguards to democracy, like free speech and electoral access.

In many of these cases, the current political climate can be explained by the proliferation of illiberal democracy. Although illiberal democracies may at first appear to be a functioning “democracy,” upon closer look, it quickly becomes apparent that illiberal democracies are shells of their “liberal” counterparts.⁴ Illiberal democracies may retain some democratic political liberties, like free elections or separation of powers, but they lack strong protections of the civil liberties provided by constitutional liberalism in liberal democracies. The rise of illiberal democracy in Hungary, the focus of this Note, is perfectly illustrated by Fidesz's ongoing attempt to push Central European University into exile and other unilateral attacks on academic freedom. In order to fully understand this complex situation, one must look not only to democratic theory, but to the history of Central Europe, Hungarian nationalism, and Fidesz's manipulation of the rule of law. This Note situates the Hungarian case as a cautionary tale and attempts to comprehend how the trend of illiberal democracy can flourish in the most prosperous age for democracy to date, using academic freedom as a point of focus. Part I situates this global phenomenon within a theoretical framework of democratic wave theory and illiberal democracy. Part II applies Part I to Prime Minister Viktor Orbán's rise to power in Hungary. Finally, Part III analyzes how Hungarian illiberal democracy has impacted academic freedom in the country.

³ See, e.g., Jens Becker, *The Rise of Right-Wing Populism in Hungary*, 13 SEER: J. FOR LAB. & SOC. AFF. E. EUR. 29, 33 (2010) (“The European elections in 2009 had seen a writing on the wall regarding the future crash of the left, with FIDESZ obtaining 56.4 per cent of the votes against MSZP's 17.4 per cent. The elections of 2010 on 11 and 25 [of] April made this definitively clear.”); Michał Słowiowski & Michał Pierzgański, *The Party System and Voting Behavior in Poland*, in CIVIC AND UNCIVIC VALUES IN POLAND: VALUE TRANSFORMATION, EDUCATION, AND CULTURE 41, 61 (Sabrina P. Ramet et al. eds., 2019) (“After the elections of 2015, the largest party in the parliament is now Law and Justice (PiS), which won an absolute majority of seats in both houses of the Polish parliament.”); CATHERINE FIESCHI, *POPULOCRACY: THE TYRANNY OF AUTHENTICITY AND THE RISE OF POPULISM* 101 (2019) (“The year 2008 marks the beginning of populism's full ideological development in Italy: [Movimento Cinque Stelle] began to capitalize on the deep transformation of the voters through its use of the Web, and the promise of a different, transparent and authentic bottom-up movement; while the Lega began to transcend its geographical limits and move southward with the aim of conquering Berlusconi strongholds through a discourse of common sense in the face of Italy's main challenges . . .”).

⁴ *Infra* Part I.B.

I. THEORETICAL UNDERPINNINGS: THE THIRD REVERSE WAVE, ILLIBERAL DEMOCRACY, AND THE NATION-STATE

A. *Democracy's Third Reverse Wave*

In 1991, Samuel P. Huntington posited that democratization occurs in the form of waves. Huntington theorized that “[a] wave of democratization is a group of transitions from nondemocratic to democratic regimes that occur within a specified period of time that significantly outnumber transitions in the opposite direction during that period of time.”⁵ Under Huntington’s wave theory, he also identifies the trend of the reverse wave. After each wave of democratization, there is a reverse wave, under which nation-states that “had previously made the transition to democracy reverted to nondemocratic rule.”⁶ Huntington acknowledges that it would be arbitrary to prescribe a rigid date range pinpointing each wave, but nonetheless poses an approximate era for each wave.⁷ Huntington subsequently proposes the following structure to describe the modern situation of democracy:

First, long wave of democratization

First reverse wave

Second, short wave of democratization

Second reverse wave

Third wave of democratization.⁸

Huntington’s first wave of democratization was indeed long, spanning between approximately 1828 to 1926.⁹ This first wave was influenced by the American and French revolutions that took place nearly a century prior and was defined by a substantial widening of suffrage, reduced plural voting, and the secret ballot.¹⁰ Under this first wave, twenty-nine democracies emerged.¹¹ The first reverse wave arrived in 1922 with Mussolini’s (democratic) ascension to power and ended with the defeat of the Axis forces in the Second World War.¹² The first reverse wave was characterized by “the shift away from democracy and either the return to

⁵ SAMUEL P. HUNTINGTON, *THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY* 15 (1991).

⁶ *Id.* at 16.

⁷ *Id.* (“It is also arbitrary to attempt to specify precisely the dates of democratization waves and reverse waves. It is, nonetheless, often useful to be arbitrary . . .”).

⁸ *Id.*

⁹ *Id.* at 16–17.

¹⁰ *Id.* at 16.

¹¹ Samuel P. Huntington, *Democracy's First Wave*, 2 J. DEMOCRACY 12, 12 (1991).

¹² HUNTINGTON, *supra* note 5, at 17–18.

traditional forms of authoritarian rule or the introduction of new mass-based, more brutal and pervasive forms of totalitarianism,”¹³ and tended to occur in countries that had adopted democratic forms of governance either before the First World War or during the interwar period.¹⁴ Countries that experienced nondemocratic régime change “reflected the rise of communist, fascist, and militaristic ideologies.”¹⁵ Even in countries where democracy remained in place, antidemocratic movements gained strength.¹⁶

Huntington’s second wave of democratization followed the Allied victory and extended until the early 1960s, where “Allied occupation promoted inauguration of democratic institutions,”¹⁷ and fledgling democracies emerged during the beginning of the end of colonialism.¹⁸ Contrary to Europe’s democracies reemerging under Allied occupation, “no real effort was made to introduce democratic institutions” during decolonization in Africa and South Asia.¹⁹ This led to mixed results: while some new states, such as Nigeria and India, established democracies that were maintained for at least a decade, in other states, democracy was tenuous and the institutions supporting it were shaky at best.²⁰ By the late 1950s and early 1960s, the second wave of democracy had ebbed and “political development[s] and regime transitions were taking on a heavily authoritarian cast.”²¹ Latin America experienced numerous *coups d’état*, primarily led by military régimes, which established bureaucratic authoritarianism²² throughout the region.²³ Similar military *coups d’état*

¹³ *Id.* at 17.

¹⁴ *Id.*

¹⁵ *Id.* at 18.

¹⁶ *Id.* (“In France, Britain, and other countries where democratic regimes remained in place, antidemocratic movements gained strength from the alienation of the 1920s and the depression of the 1930s.”).

¹⁷ *Id.*

¹⁸ *Id.* at 19.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² The term “bureaucratic authoritarianism” was first coined by Guillermo O’Donnell in 1973 to explain the novel type of military rule in Latin America.

This form of rule has been interpreted as distinctively bureaucratic because national leadership was dominated by individuals who had risen to prominence not through political careers but through bureaucratic careers in large public and private organizations. . . . Decision-making styles among these leaders were commonly technocratic. This bureaucratic, technocratic orientation was generally accompanied by intense repression, which in most of the cases reached levels unprecedented in the region.

THE OXFORD COMPANION TO POLITICS OF THE WORLD 93 (Joel Krieger ed., 2d ed. 2001). The military-led coups in Brazil (1964), Chile (1973), and Argentina (1976) are all examples of bureaucratic authoritarian military régimes. See, e.g., *Remembering Brazil’s Military Coup 50 Years*

occurred throughout nations in Asia and the Mediterranean region.²⁴ At the same time, rapid decolonization caused democratic instability in new nations: “Thirty-three other African countries that became independent between 1956 and 1970 became authoritarian with independence or very shortly after independence.”²⁵ This era of decolonization led to the largest multiplication of authoritarian régimes in history,²⁶ accompanied by a worldwide decline in democratic governments. One study estimates that one third of the thirty-two functioning democracies in the world in 1958 had become authoritarian by the mid 1970s.²⁷ Huntington argues that this reverse wave was especially notable due to the fact that some nations undergoing nondemocratic régime changes had sustained democracy for over a quarter century.²⁸

Huntington’s third and final democratic wave began with the Portuguese Carnation Revolution of 1974 and extended through *The Third Wave*’s publication in 1991.²⁹ During this time period, approximately thirty countries in Europe, Asia, and Latin America replaced their authoritarian régimes with democracies.³⁰ The wave began in Southern European nations—Portugal, Spain, Greece—and spread to the bureaucratic authoritarian régimes in Latin America and the military dictatorships in Asia throughout the 1970s and 1980s.³¹ By the end of the 1980s, “the democratic wave engulfed the communist world.”³² After forty-five years of Soviet occupation, Hungary transitioned to a multiparty system in

Later, NACLA (Apr. 1, 2014), <https://nacla.org/news/2014/4/1/remembering-brazils-military-coup-50-years-later> (recounting Brazil’s military dictatorship); Daniel Sheehy, *An Eyewitness Account of Pinochet’s Coup 45 Years Ago*, SMITHSONIAN MAG. (Sept. 10, 2018), <https://www.smithsonianmag.com/smithsonian-institution/eyewitness-account-pinochets-coup-45-years-ago-180970241/> (discussing a scholar’s daily life under Pinochet’s régime); Uki Goñi, *The Long Shadow of Argentina’s Dictatorship*, N.Y. TIMES (Mar. 21, 2016), <https://www.nytimes.com/2016/03/23/opinion/the-long-shadow-of-argentinas-dictatorship.html> (outlining the human rights abuses committed by Argentina’s military dictatorship).

²³ HUNTINGTON, *supra* note 5, at 19.

²⁴ See *id.* at 19–20 (discussing democratic backsliding and authoritarian régimes in Asian and Mediterranean countries in the 1950s through the 1980s).

²⁵ *Id.* at 20.

²⁶ *Id.* at 20–21.

²⁷ *Id.* at 21. Another report found that in 1962, thirteen governments were produced via *coups d’état*, and by 1975, thirty-eight were. *Id.* In 1960, nine out of ten South American nations that were former Iberian colonies had democratically elected governments. *Id.* But by 1973, only Venezuela and Colombia were left. *Id.*

²⁸ See *id.* (“This wave of transitions away from democracy was even more striking because it involved several countries, such as Chile, Uruguay (‘the Switzerland of South America’), India, and the Philippines, that had sustained democratic regimes for a quarter century or more.”).

²⁹ *Id.* at 21–27.

³⁰ *Id.* at 21.

³¹ *Id.* at 21–23.

³² *Id.* at 23.

1988.³³ Likewise, Hungary's Central and Eastern European neighbors began their own democratic transitions.³⁴ The number of democratic states rose from thirty in 1973 to fifty-eight by 1990, increasing the percentage of democratic states from 24.6 percent to 45 percent.³⁵ Soviet occupation was the principal obstacle to democratization for countries east of the Iron Curtain, and once removed, the region swiftly adopted democratic governments.³⁶

By 1990, many of the catalysts for the third wave of democracy had stalled; "[n]either the White House, the Kremlin, the Vatican, nor the European Community were in a strong position to promote democracy. . . ."³⁷ At the same time, at least two of the new third wave democracies had already shifted back towards authoritarianism.³⁸ While it is difficult to definitively predict the duration of the third wave and what conditions may give rise to the next reverse wave, Huntington draws three generalizations from prior reverse waves to aid in comprehending the possible form of the third reverse wave. First, Huntington argues that "the causes of shifts from democratic to authoritarian political systems were at least as varied as and in part overlap with the causes of shifts from authoritarianism to democracy."³⁹ Huntington provides a useful rubric of factors that contributed to the first and second reverse waves.⁴⁰ The factors are as follows:

- (1) the weakness of democratic values among key elite groups and the general public;
- (2) economic crisis or collapse that intensified social conflict and enhanced the popularity of remedies that could only be imposed by authoritarian governments;
- (3) social and political polarization often produced by leftist governments attempting to introduce or appearing to introduce too many major socioeconomic reforms too quickly;
- (4) the determination of conservative middle- and upper-class groups to exclude populist and leftist movements and lower-class groups from political power;

³³ *Id.*

³⁴ *Id.* (noting how such democratic transition included the Baltic republics and Poland).

³⁵ *Id.* at 26 tbl.1.1. Note that Huntington's figures exclude nations with populations under one million. *Id.*

³⁶ *Id.* at 288–89.

³⁷ *Id.* at 289.

³⁸ *Id.* at 290.

³⁹ *Id.*

⁴⁰ *Id.*

- (5) the breakdown of law and order resulting from terrorism or insurgency;
- (6) intervention or conquest by a nondemocratic foreign government;
- (7) snowballing in the form of the demonstration effects of the collapse or overthrow of democratic systems in other countries.⁴¹

Second, “transitions from democracy to authoritarianism were almost always produced by those in power or close to power in the democratic system.”⁴² The vast majority of these previous transitions away from democracy occurred as either military *coups d’état* under which democratically elected leaders were ousted or through “executive coups,”⁴³ where democratically elected heads of government concentrated power in the executive by declaring a state of emergency or instituting martial law.⁴⁴ Finally, in each reverse wave, “democratic systems were replaced by historically new forms of authoritarian rule.”⁴⁵ Under the first wave, fascism differed from prior models of authoritarianism due to “its mass base, ideology, party organization, and efforts to penetrate and control most of society.”⁴⁶ Likewise, bureaucratic authoritarianism can be distinguished from other forms of authoritarian military rule by its institutional character.⁴⁷ Therefore, the authoritarianism set to emerge under the reverse wave theory should be expected to reinvent itself.

Currently, the world is in the throes of Huntington’s third reverse wave. Democracy has statistically entered an international era of decline.⁴⁸ Freedom House has documented “global declines in political rights and civil liberties” from 2005 to 2018 in their annual *Freedom in the World*

⁴¹ *Id.* at 290–91.

⁴² *Id.* at 291. This claim exempts régime changes that were produced by foreign actors. *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 292.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ See, e.g., FREEDOM HOUSE, FREEDOM IN THE WORLD 2019: DEMOCRACY IN RETREAT 3–5 (2019), https://freedomhouse.org/sites/default/files/Feb2019_FH_FITW_2019_Report_ForWeb-compressed.pdf (“*Freedom in the World* has recorded global declines in political rights and civil liberties for an alarming 13 consecutive years, from 2005 to 2018. The global average score has declined each year, and countries with net score declines have consistently outnumbered those with net improvements.”); *A Global Report on the Decline of Democracy*, FOREIGN AFF. (Apr. 17, 2018), <https://www.foreignaffairs.com/press/2018-04-17/global-report-decline-democracy> (summarizing articles published in the May/June 2018 *Foreign Affairs* issue on democratic decline); VARIETIES OF DEMOCRACY INST., DEMOCRACY FOR ALL?: V-DEM ANNUAL DEMOCRACY REPORT 2018, at 6 (2018), https://www.v-dem.net/media/filer_public/3f/19/3f19efc9-e25f-4356-b159-b5c0ec894115/v-dem_democracy_report_2018.pdf (finding that autocratization has affected 2.5 billion people, or a third of the world).

rankings.⁴⁹ The international rise of the far-right satisfies and builds upon Huntington's three generalizations: the factors that may lead to democratic decline, the modes of régime transition, and the shifting image of authoritarianism. First, many of the issues contributing to the international rise of the far-right reflect the factors laid out by Huntington. These factors will be employed throughout the rest of this Note to analyze the preconditions for illiberal democracy. Huntington's second generalization regarding the mode of transition is the least apt to analyze the rise of the far-right vis-à-vis illiberal democracy. Under the majority of illiberal democracies, entire far-right political parties have seized power not through *coups d'état* or executive coups, but through the democratic process. In Hungary, this reverse wave is more party-centric than executive-centric. And finally, illiberal democracy is the answer to Huntington's claim that each reverse wave brings a novel form of authoritarianism. The following section will theorize illiberal democracy and the conditions that fomented its development with a focus on Orbán's Hungary.

B. *The Rise of Illiberal Democracy*

The term "illiberal democracy" was originally coined by Fareed Zakaria in 1997⁵⁰ and was then later appropriated by Prime Minister Viktor Orbán as an ideological image of Fidesz's Hungary.⁵¹ The emergence of illiberal democracy in the twenty-first century is the modern form of authoritarianism necessary for the third reverse wave of democracy.⁵²

⁴⁹ FREEDOM HOUSE, *supra* note 48, at 4.

⁵⁰ Fareed Zakaria, *The Rise of Illiberal Democracy*, 76 FOREIGN AFF. 22, 22 (1997).

⁵¹ Csaba Tóth, *Full Text of Viktor Orbán's Speech at Băile Tușnad (Tusnádfürdő) of 26 July 2014*, BUDAPEST BEACON (July 29, 2014), <https://budapestbeacon.com/full-text-of-viktor-orbans-speech-at-baile-tusnad-tusnadfurdo-of-26-july-2014/> ("Meaning, that Hungarian nation is not a simple sum of individuals, but a community that needs to be organized, strengthened and developed, and in this sense, the new state we are building is an illiberal state, a non-liberal state. It does not deny foundational values of liberalism, as freedom, [et cetera]. But it does not make this ideology a central element of state organization, but applies a specific, national, particular approach in its stead.").

⁵² Illiberal democracy does have a nomenclatural weakness—its name does not on its face convey the fascistic tendencies of many illiberal leaders. And, as a result, other terminologies also attempt to conceptualize this phenomenon. For example, Gáspár Miklós Tamás developed the concept of post-fascism to describe a "cluster" of behavior:

[P]olicies, practices, routines, and ideologies that can be observed everywhere in the contemporary world; that have little or nothing to do, except in Central Europe, with the legacy of Nazism; that are not totalitarian; that are not at all revolutionary; and that are not based on violent mass movements and irrationalist, voluntaristic philosophies, nor are they toying, even in jest, with anti-capitalism.

G.M. Tamás, *On Post-Fascism*, BOS. REV. (June 1, 2000), <http://bostonreview.net/world/g-m-tamas-post-fascism>. Post-fascism in ideology bears resemblance to classical fascism because of its open hostility to universal citizenship embraced by the Enlightenment, instead believing that some classes of

Unlike its predecessors, illiberal democracy arises more subtly than traditional forms of authoritarian rule. As opposed to traditional authoritarianism⁵³—defined by closed society,⁵⁴ use of force, and formal censorship—illiberal democracies feign compliance with the general principles of democracy. Many of the national parties promoting illiberal democracy gain power through legitimate democratic means.⁵⁵ Once elected, “they use the levers of democratic institutions to consolidate control, all while claiming popular support from the people to protect the nation from foreign or domestic threats.”⁵⁶ While in power, these régimes parasitically sap the strength out of the democratic institutions through which they were elected. This Section explores the theoretical contours of illiberal democracy, contrasted with liberal democracy, to illustrate the individual case of Hungary.

To properly define illiberal democracy, one must first examine the characteristics of a *liberal* democracy. Zakaria’s article and subsequent book describes a liberal democracy as “a political system marked not only by free and fair elections, but also by the rule of law, a separation of powers, and the protection of basic liberties of speech, assembly, religion,

people do not deserve citizenship to the nation and the civic rights associated with membership. *Id.* This is particularly important as Enlightenment citizenship was equated with human dignity and by recognizing universal citizenship we, in turn, recognize those citizens as human. *Id.* When classical fascists and the post-fascists of today reject the citizenship of classes of people within the nation-state, fascists also reject their humanity. *Id.* Under classical fascism, “civic death was necessarily followed by natural death, that is, violent death, or death *tout court*.” *Id.* Post-fascism, however, replaces literal death with figurative death in an anti-Enlightenment illiberal democracy. The sovereign simultaneously grants citizenship to *some* residents of the nation-state while also refusing the humanity of others. Also, unlike classical fascism, “[p]ost-fascism finds its niche easily in the new world of global capitalism without upsetting the dominant political forms of electoral democracy and representative government.” *Id.*

⁵³ See HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 408–09 (1968) (“As techniques of government, the totalitarian devices appear simple and ingeniously effective. They assure not only an absolute power monopoly, but unparalleled certainty that all commands will always be carried out; the multiplicity of the transmission belts, the confusion of the hierarchy, secure the dictator’s complete independence of all his inferiors and make possible the swift and surprising changes in policy for which totalitarianism has become famous.”).

⁵⁴ See K. R. POPPER, *THE OPEN SOCIETY AND ITS ENEMIES* 49 (1945) (“It is one of the characteristic features of the magical attitude of a primitive tribal or ‘closed’ society that it lives in a charmed circle of unchanging taboos, of laws and customs which are felt to be as inevitable as the rising of the sun, or the cycle of the seasons, or similar obvious regularities of nature.”); cf. HENRI BERGSON, *THE TWO SOURCES OF MORALITY AND RELIGION* 229 (R. Ashley Audra & Cloudesley Brereton trans., 1935) (“The closed society is that whose members hold together, caring nothing for the rest of humanity, on the alert for attack or defence, bound in fact, to a perpetual readiness for battle. . . . Man was made for this society, as the ant was made for the ant-heap.”).

⁵⁵ ALINA POLYAKOVA ET AL., BROOKINGS, *THE ANATOMY OF ILLIBERAL STATES: ASSESSING AND RESPONDING TO DEMOCRATIC DECLINE IN TURKEY AND CENTRAL EUROPE* 2 (2019), <https://www.brookings.edu/wp-content/uploads/2019/02/illiberal-states-web.pdf>.

⁵⁶ *Id.*

and property.”⁵⁷ Liberal democracies are also open societies⁵⁸ that tend to value civic nationalism.⁵⁹ Similarly, Freedom House’s annual *Freedom in the World* report splits its criteria for freedom into two separate rankings: political rights and civil liberties.⁶⁰ States with the highest political rights rankings “enjoy a wide range of political rights, including free and fair elections. Candidates who are elected actually rule, political parties are competitive, the opposition plays an important role and enjoys real power, and the interests of minority groups are well represented in politics and government.”⁶¹ In order to attain a full forty-point ranking for political rights, states must score positively on criteria concerning the electoral process, political pluralism and participation, and the functioning of government.⁶² In the realm of civil liberties, state treatment of the freedom of expression and belief, associational and organizational rights, rule of law, and personal autonomy and individual rights are considered criteria for a free state.⁶³ These two indicators, political liberties and civil liberties, correspond to democracy and constitutional liberalism, respectively.⁶⁴

Liberal democracy can be divided into two elements: democracy and constitutional liberalism.⁶⁵ While democracy primarily governs political

⁵⁷ Zakaria, *supra* note 50, at 22.

⁵⁸ Henri Bergson first described the concept of open society in 1935 and it was later expanded upon by Karl Popper’s 1945 critique of totalitarianism, *The Open Society and Its Enemies*. As opposed to a closed society, an open society is one in which “individuals are confronted with personal decisions,” base their decisions on intelligence, and are critical of the taboos readily embraced in closed societies. POPPER, *supra* note 54, at 152, 178. Popper argues that totalitarianism is a type of “reactionary movements which have tried, and still try, to overthrow civilization and return to tribalism.” *Id.* at 1. Under totalitarianism and closed societies, critical thinking becomes impossible because these societies rely on “the suppression of reason and truth” and the “brutal and violent destruction of all that is human.” *Id.* at 177. For Popper, this is the danger of totalitarianism: a return to closed societies that threaten humanity. Open societies, therefore, must support freedom of thought and expression and protect them through the rule of law.

⁵⁹ Many scholars of nationalism tend to “distinguish[] ‘civic’ and ‘ethnic,’ western and eastern, liberal and illiberal forms of nationalism.” ROGERS BRUBAKER, *ETHNICITY WITHOUT GROUPS* 5 (2004). Like many topics in nationalism, the distinction between civic and ethnic nationalism is difficult to define and, according to Brubaker, “normatively problematic,” but it is nonetheless worth discussing in the context of liberal democracy. *Id.* Under civic nationalism, “nationhood and nationalism have been linked to democracy, self-determination, political legitimacy, social integration, civil religion, solidarity, dignity, identity, cultural survival, citizenship, patriotism, and liberation from alien rule.” *Id.* at 132.

⁶⁰ MICHAEL J. ABRAMOWITZ, *FREEDOM HOUSE, FREEDOM IN THE WORLD 2018: DEMOCRACY IN CRISIS 2* (2018), <https://freedomhouse.org/report/freedom-world/2018/democracy-crisis>.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Zakaria, *supra* note 50, at 22–24.

⁶⁵ *Id.* at 22–23; see also POLYAKOVA ET AL., *supra* note 55, at 2 (“*Liberal principles*—political ideas that espouse the importance of individual liberties, minority rights, and the separation of power across levers of government—and *democratic institutions*—processes that translate popular will into public policy through legitimate elections . . .”).

rights, and is thus more process-oriented, constitutional liberalism's focus on civil rights is goal-oriented.⁶⁶ Zakaria explains that the term "constitutional liberalism" is a marriage between two interrelated concepts: "It is *liberal* because it draws on the philosophical strain, beginning with the Greeks, that emphasizes individual liberties. It is *constitutional* because it rests on the tradition, beginning with the Romans, of the rule of law."⁶⁷ Constitutional liberalism developed in Western Europe and the United States under thinkers including William Blackstone, Baron de Montesquieu, John Locke, John Stuart Mill, and Thomas Jefferson.⁶⁸ The general concept of constitutional liberalism, despite some variance, boils down to the argument "that human beings have certain natural (or 'inalienable') rights and that governments must accept a basic law, limiting its own powers, that secures them."⁶⁹ While the existence of constitutional liberalism in countries has led to the emergence of democracy, democracy does not necessarily give rise to constitutional liberalism.⁷⁰ Merely arranging free elections and protecting other political rights does not guarantee that those who democratically come to power will protect the civil liberties enshrined by constitutional liberalism.

Although democracy and constitutional liberalism are often associated as conjoined, the two are frequently in tension.⁷¹ In particular, democracy and constitutional liberalism tend to conflict on the scope of government authority: "Constitutional liberalism is about the limitation of power, [and] democracy about its accumulation and use."⁷² Democracy can undermine liberty without substantial safeguards for minority rights and liberties. John Stuart Mill warned of "the tyranny of the majority," under which the democratically-elected majority could subvert the liberties protected by constitutional liberalism.⁷³ Illiberal democracy, then, is symptomatic of this schism between democracy and constitutional liberalism.

⁶⁶ Zakaria, *supra* note 50, at 25 ("Constitutional liberalism, on the other hand, is not about the procedures for selecting government, but rather government's goals.").

⁶⁷ *Id.* at 26.

⁶⁸ *Id.* ("[Constitutional liberalism's] canonical figures include the poet John Milton, the jurist William Blackstone, statesmen such as Thomas Jefferson and James Madison, and philosophers such as Thomas Hobbes, John Locke, Adam Smith, Baron de Montesquieu, John Stewart Mill, and Isaiah Berlin.").

⁶⁹ *Id.*

⁷⁰ *Id.* at 28 ("Constitutional liberalism has led to democracy, but democracy does not seem to bring constitutional liberalism.").

⁷¹ *Id.* at 30; *see also* POLYAKOVA ET AL., *supra* note 55, at 2 ("The rise of illiberal political parties and leaders within electoral democratic systems illustrates the schism between the foundational principles and institutions of liberal democracies.").

⁷² Zakaria, *supra* note 50, at 30.

⁷³ JOHN STUART MILL, ON LIBERTY 7 (1956) ("[I]n political speculations 'the tyranny of the majority' is now generally included among the evils against which society requires to be on its guard."); *id.* at 3 ("By liberty was meant protection against the tyranny of the political rulers."); *id.* at 4 ("To prevent the weaker members of the community from being preyed upon by innumerable vultures,

Illiberal democracy, as is linguistically implied, is a form of faux-democracy whereby some legitimate democratic processes are present but without substantial safeguards of civil liberties as guaranteed by constitutional liberalism. This modern form of authoritarianism enshrines majoritarianism⁷⁴ and absolute sovereignty⁷⁵ as fundamental political values, which defy liberal democratic norms. Illiberal governments centralize authority and usurp power in a way that is “both horizontal (from other branches of the national government) and vertical (from regional and local authorities as well as private businesses and other nongovernmental groups).”⁷⁶ The claim that “unchecked centralization has been the enemy of liberal democracy”⁷⁷ is self-evident—Mussolini, for example, was a democratically elected fascist who quickly centralized power into totalitarian control.⁷⁸ Likewise, “[i]lliberal democracies gain legitimacy, and thus strength, from the fact that they are reasonably democratic. Conversely, the greatest danger that illiberal democracy poses—other than to its own people—is that it will discredit liberal democracy itself, casting a shadow on democratic governance.”⁷⁹ Put another way, illiberal democracy “is democratic because it respects the will of the majority; illiberal because it disregards the concerns of minorities.”⁸⁰ Emerging illiberal democracies can be identified by their *modus operandi* that enshrines values of nationalism, majoritarianism, dictatorship of law, absolute sovereignty, and anti-intellectualism.

it was needful that there should be an animal of prey stronger than the rest, commissioned to keep them down. . . . The aim, therefore, of patriots, was to set limits to the power which the ruler should be suffered to exercise over the community; and this limitation was what they meant by liberty.”).

⁷⁴ ARCH PUDDINGTON, FREEDOM HOUSE, *BREAKING DOWN DEMOCRACY: GOALS, STRATEGIES, AND METHODS OF MODERN AUTHORITARIANS* 7 (2017), https://freedomhouse.org/sites/default/files/June2017_FH_Report_Breaking_Down_Democracy.pdf

(“A single idea of many authoritarians is the proposition that elections are winner-take-all affairs in which the victor has an absolute mandate, with little or no interference, from institutional checks and balances. . . . The Hungarian prime minister, Viktor Orbán, has instituted a thorough overhaul of the country’s constitution and national legislation with an eye toward measures that will insulate his party from future defeat.”).

⁷⁵ *Id.* (“A number of governments have invoked the doctrine of absolute sovereignty to rebuff international criticism of restrictions on the press, the smothering of civil society, the persecution of the political opposition, and the repression of minority groups. They claim that the enforcement of universal human rights standards or judgments from transnational legal bodies represent undue interference in their domestic affairs and a violation of national prerogatives.”).

⁷⁶ Zakaria, *supra* note 50, at 30.

⁷⁷ *Id.* at 32.

⁷⁸ John Foot & Christopher Hibbert, *Benito Mussolini*, *ENCYCLOPEDIA BRITANNICA*, <https://www.britannica.com/biography/Benito-Mussolini> (last updated Jan. 10, 2020).

⁷⁹ Zakaria, *supra* note 50, at 42.

⁸⁰ MADELEINE ALBRIGHT, *FASCISM: A WARNING* 172 (2018).

C. *The Illiberal Toolkit: Nationalism, Anti-Intellectualism, and Other Illiberal Values*

1. *Nationalism*

Modern nationalism guides much of the behavior exhibited by illiberal democracies and deeper exploration is necessary to fully understand its global rise. Illiberal democratic governments enshrine the needs of the community over individual rights.⁸¹ These governments are wont to conceive “the community” as not citizens of the polity, but instead appeal to nationalistic conceptions of “the community” that are demarcated by bloodline.⁸² Illiberal democracies differ from their liberal counterparts by subverting civil liberties traditionally delegated to “the people” by constitutional liberalism that is inclusive of all citizens, regardless of ethnic, religious, political, or other identities. Instead, these leaders narrowly tailor “the people” to mean those supportive of the illiberal government that belong to certain ethnic groups, while otherizing the rest.⁸³ This anti-pluralism stokes the flames of ethnic nationalism while bulldozing the civic nationalism traditionally associated with liberal democracies. Ethnic nationalism, a manifestation of nationalism in which the nation-state is defined on the basis of ethnicity,⁸⁴ is a core feature of illiberal democracies.

Nationalism as an ideology is a modern phenomenon and is deeply prevalent throughout contemporary societies. Nationalism is “notoriously difficult to define.”⁸⁵ In *Imagined Communities*, Benedict Anderson’s magnum opus, “the nation” is defined as “an imagined political community—and imagined as both inherently limited and sovereign.”⁸⁶ This definition builds upon Ernest Gellner’s conception of nationalism as “not the awakening of nations to self-consciousness: it invents nations where they do not exist.”⁸⁷ As such, the nation is a socially constructed

⁸¹ See *id.* (“An illiberal democracy is centered on the supposed needs of the community rather than the inalienable rights of the individual. It is democratic because it respects the will of the majority; illiberal because it disregards the concerns of minorities.”).

⁸² See *id.* (“[T]he togetherness [Orbán] envisions is defined by bloodlines, not borderlines.”).

⁸³ See *id.* (discussing how illiberal democracies disregard the needs and rights of minorities).

⁸⁴ See, e.g., BRUBAKER, *supra* note 59, at 132 (“[Ethnic] nationalism has been associated with militarism, war, irrationalism, chauvinism, intolerance, homogenization, forced assimilation, authoritarianism, parochialism, xenophobia, ethnocentrism, ethnic cleansing, even genocide; it has been characterized as the ‘starkest political shame of the twentieth century.’”).

⁸⁵ BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* 3 (rev. ed. 2006).

⁸⁶ *Id.* at 6.

⁸⁷ ERNEST GELLNER, *THOUGHT AND CHANGE* 168 (1964). Gellner later expanded on his theories of nationalism in *NATIONS AND NATIONALISM* (1983).

community that is imagined⁸⁸ by those that identify as members of the group. The nation is imagined as a limited sovereign community: limited because its borders are finite,⁸⁹ sovereign because of the influence of Enlightenment ideals on political values,⁹⁰ and a community because of the deep comradeship prevalent amongst citizens of the nation-state.⁹¹ Modernist theorists like Anderson contend that nationalism as an ideology was able to arise due to technological and socio-economic advances brought about by the Industrial Revolution.⁹² Anderson singles out print-capitalism as a precursor to the development of national consciousness—a shared sense of national identity.⁹³ Print-capitalism unified local dialects into a language that members of a nation-state could all understand vis-à-vis mechanical reproduction⁹⁴ made possible by the printing press and the proliferation of capitalism.⁹⁵ Print-capitalism allowed nations to consolidate numerous vernaculars into a unified language representative of the nation, as will be seen with the Magyarization of Hungary.⁹⁶

Nation-states are socially constructed imagined communities that purport to unify groups of peoples based on shared identity within the confines of their finite borders. Under this framework of nationalism,

⁸⁸ ANDERSON, *supra* note 85, at 6 (“It is *imagined* because the members of even the smallest nation will never know most of their fellow-members, meet them, or even hear of them, yet in the minds of each lives the image of their communion.”).

⁸⁹ *Id.* at 7 (“The nation is imagined as *limited* because even the largest of them, encompassing perhaps a billion living human beings, has finite, if elastic, boundaries, beyond which lie other nations.”).

⁹⁰ *Id.* (“It is imagined as *sovereign* because the concept was born in an age in which Enlightenment and Revolution were destroying the legitimacy of the divinely-ordained, hierarchical dynastic realm.”).

⁹¹ *Id.* (“Finally, it is imagined as a *community*, because, regardless of the actual inequality and exploitation that may prevail in each, the nation is always conceived as a deep, horizontal comradeship. Ultimately it is this fraternity that makes it possible, over the past two centuries, for so many millions of people, not so much to kill, as willingly to die for such limited imaginings.”).

⁹² *Id.* at 46.

⁹³ *Id.* at 44–45 (“These print-languages laid the bases for national consciousness in three distinct ways. First and foremost, they created unified fields of exchange and communication below Latin and above spoken vernaculars. . . . Second, print-capitalism gave a new fixity to language, which in the long run helped to build that image of antiquity so central to the subjective idea of the nation. . . . Third, print-capitalism created languages of power of a kind different from the older administrative vernaculars. Certain dialects inevitably were ‘closer’ to each print-language and dominated their final forms.”).

⁹⁴ See also WALTER BENJAMIN, *The Work of Art in the Age of Mechanical Reproduction*, in ILLUMINATIONS 217, 219–20 (Harry Zohn trans., 1969) (“Around 1900 technical reproduction had reached a standard that not only permitted it to reproduce all transmitted works of art and thus to cause the most profound change in their impact upon the public; it also had captured a place of its own among the artistic processes.”).

⁹⁵ See ANDERSON, *supra* note 85, at 37–44 (tracing the development of mass and mechanical reproduction and its effect on the consolidation of languages).

⁹⁶ See *infra* note 113 (discussing the history of Magyarization in nineteenth century Hungary).

“[t]he formulation of the nation thus appears as the fulfillment of a ‘project’ stretching over centuries.”⁹⁷ As illiberal democracies narrow the perception of who belongs in their imagined community, two questions are raised. First, “[w]hat makes the nation a ‘community’?”⁹⁸ And second, who are “the people” that are accepted into the community? The nation-as-community conceived of by Anderson is inherently tied to the *fraternité* expressed by those within the nation-state. Étienne Balibar⁹⁹ writes:

*Every social community reproduced by the functioning of institutions is imaginary, that is to say, it is based on the projection of individual existence into the web of a collective narrative, on the recognition of a common name and on traditions lived as the trace of an immemorial past (even when they have been fabricated and inculcated in the recent past). But this comes down to accepting that, under certain conditions, only imaginary communities are real.*¹⁰⁰

Therefore, the socially-constructed “community” is reified by the people that further the collective narratives and mythologies of the nation-state. Balibar argues that theoretically, this community of people recognizes itself as an entity or group distinct from other states *prior* to the foundation of the institutional state.¹⁰¹ But this is clearly contradictory and impossible to actualize. Therefore, the nation cannot precede the state:

⁹⁷ ÉTIENNE BALIBAR & IMMANUEL WALLERSTEIN, RACE, NATION, CLASS: AMBIGUOUS IDENTITIES 86 (Chris Turner trans., 1991).

⁹⁸ *Id.* at 93.

⁹⁹ Étienne Balibar wrote, “Thinking about racism led us back to nationalism, and nationalism to uncertainty about the historical realities and categorization of the nation.” Étienne Balibar, *The Nation Form: History and Ideology*, 13 REV. (FERNAND BRAUDEL CTR.) 329, 329 (1990). Balibar sought to understand how the nation-state arose and found current explanations to be unsatisfactory. The state refers to the institutional apparatuses of a country, while the nation connotes some sort of identity. Balibar argues that logically, states must have predated the nation-state and could not have arose simultaneously. Therefore, he held, “it was by becoming ‘national’ that the states transformed themselves, more or less completely, into what we call the modern state.” *Id.* at 330. Balibar theorized that nation-states are created in one of three ways:

Either the states came into existence “endogenously,” seemingly autonomously, in tandem with a process of nationalizing the state that was already located in that territory, or they came into existence via “nationalist” (or “national liberation”) movements, by struggling against national states that already existed or were being created, or against “non-national” sovereign states (such as “multinational” empires, which thereby came to seem anachronistic).

Id. at 331.

¹⁰⁰ BALIBAR, *supra* note 97, at 93.

¹⁰¹ *Id.*

In reality, the idea of nations without a state, or nations “before” the state, is thus a contradiction in terms, because the state always is implied in the historic framework of a national formation But this contradiction is masked by the fact that national states . . . project beneath their political existence to a preexisting “ethnic” or “popular” unity.¹⁰²

As such, the nation must be a product of the state, which adopts the “nation” as its identity. By “becoming ‘national,’”¹⁰³ the state transforms itself into “the modern state”;¹⁰⁴ the nation-state.¹⁰⁵ In order to become “national,” the nation-state must manufacture an identity to define the confines of the community: “The fundamental problem is therefore to produce the people. More exactly, it is to make the people produce itself continually as a national community.”¹⁰⁶

For Balibar, who was investigating the nation-state to understand “the causes and ‘deep’ structures of contemporary racism,”¹⁰⁷ that manufactured identity is “fictive ethnicity.”¹⁰⁸ An imagined community can become a nation-state only if it is made up of persons that embrace the *fraternité* that binds together the community, which does not exist naturally within any state.¹⁰⁹ A nation-state requires “the people” to be more than a mere abstraction and to share a common bond that legitimizes the “national” aspect of the nation-state.¹¹⁰ This is instituted through fictive ethnicity, especially in the case of ethnic nationalism. By constructing a fictive ethnicity that appeals to an imagined community and convinces community members of their shared “ethnicity,” the nation-state and the

¹⁰² Balibar, *supra* note 99, at 331.

¹⁰³ *Id.* at 330.

¹⁰⁴ *Id.*

¹⁰⁵ Balibar argues that the modern nation-state can be identified by: “its ideology and collective sovereignty; its juridical and administrative rationality; its particular mode of regulating social conflicts, especially class conflicts; and its ‘strategic’ objective of managing its territorial resources and population to enhance its economic and military power.” *Id.* at 330–31.

¹⁰⁶ BALIBAR, *supra* note 97, at 93.

¹⁰⁷ Balibar, *supra* note 99, at 329.

¹⁰⁸ BALIBAR, *supra* note 97, at 96.

¹⁰⁹ *See id.* at 93 (“A social formation only reproduces itself as a nation to the extent that, through a network of apparatuses and daily practices, the individual is instituted as *homo nationalis* from cradle to grave, at the same times he or she is instituted as *homo œconomicus, politicus, religious*. . . . [S]uch a people does not exist naturally, and even when it is tendentially constituted, it does not exist all the time. No modern nation possesses a given ‘ethnic’ basis, even when it arises out of a national independence struggle.”).

¹¹⁰ *See id.* (“In the case of national formations, the imaginary which inscribes itself in the real in this way is that of the ‘people’. It is that of a community which recognizes itself in advance in the institution of the state, which recognizes that the state as ‘its own’ in opposition to other states and, in particular, inscribes its political struggles within the horizon of that state—by, for example, formulating its aspirations for reform and social revolution as projects for the transformation of ‘its national state’.”).

patriotism that accompanies it is reified.¹¹¹ In the metamorphosis of the state into the nation-state, the population within the borders of the new nation-state is “ethnicized” in a chrysalis that treats the group “as if they formed a natural community, possessing of itself an identity of origins, culture and interests which transcends individuals and social conditions.”¹¹² Ethnicity is produced through two modes—language¹¹³ and race—and is established through various state institutions, including schooling.¹¹⁴ Fictive ethnicity is weaponized by nationalistic illiberal democracies and is instrumental in understanding who are “the people” that are admitted to illiberal régimes and the compatriots that are excluded.

2. Majoritarianism, Dictatorship of Law, and Absolute Sovereignty

Despite its resemblance to democracy, illiberal democracies, informed by ethnic nationalism, have mobilized alternative values that challenge post-Cold War democratic norms. First, illiberal leaders tend to embrace majoritarianism, the notion that the majority of a population should be granted primacy when determining the outcome of a decision.¹¹⁵ Majoritarianism has long been rebuked by foundational democratic

¹¹¹ *Id.* at 96 (“Fictive ethnicity is not purely and simply identical with the *ideal nation* which is the object of patriotism, but it is indispensable to it, for, without it, the nation would appear precisely only as an idea or an arbitrary abstraction; patriotism’s appeal would be addressed to no one. It is fictive identity which makes it possible for the expression of a preexisting unity to be seen in the state, and continually to measure the state against its ‘historic mission’ in the service of the nation, and as a consequence, to idealize politics.”).

¹¹² *Id.*

¹¹³ In Hungary, the fictive ethnicity of the Magyar is deeply rooted in language. Hungarian is an extremely distinct language in the Finno-Ugric family whose closest relatives are Finnish and Estonian. Hungarian has no relation to the Slavic languages spoken in the nations surrounding Hungary. *Finno-Ugric Languages*, ENCYCLOPÆDIA BRITANNICA, <https://www.britannica.com/topic/Finno-Ugric-languages> (last visited Mar. 24, 2019). In the late nineteenth century, Hungary began the process of Magyarization, under which non-Magyar minorities in Hungary were forced to assimilate by adopting the Hungarian language and culture. See ANDERSON, *supra* note 85, at 101–07 (detailing the process of Magyarization). Linguistic nationalism still exists in Hungary, and can be seen as a common theme in Orbán’s speeches. See, e.g., Prime Minister Viktor Orbán, Orbán Viktor’s Ceremonial Speech on the 170th Anniversary of the Hungarian Revolution of 1848 (Mar. 15, 2018) (“They want us to hand it over to foreigners coming from other continents, who do not speak our language, and who do not respect our culture, our laws or our way of life: people who want to replace what is ours with what is theirs.”); Prime Minister Viktor Orbán, Prime Minister Viktor Orbán’s Address After Swearing the Prime-Ministerial Oath of Office (May 10, 2018) (“We are a unique species. We have a language that is unique to us. There is a world which we alone see and which we alone render through the prism of Hungarian language and culture. Without us human civilisation would certainly be deprived of a language, a view and a characterisation of the world. . . . I believe that Hungary, and the Hungarian language and culture, exert an enormous magnetic power, which will attract those Hungarians whom the wind has blown from the Carpathian Basin.”).

¹¹⁴ BALIBAR, *supra* note 97, at 96 (“History shows us that there are two great competing routes to this: language and race.”).

¹¹⁵ Nicholas Capaldi, *Majoritarianism*, ENCYCLOPÆDIA BRITANNICA, <https://www.britannica.com/topic/majoritarianism> (last visited Mar. 18, 2019).

political philosophers and is exemplified in Mill's "tyranny of the majority."¹¹⁶ Majoritarianism is prevalent when illiberal democracies approach elections as a "winner-take-all affair[] in which the victor has an absolute mandate, with little or no interference from institutional checks and balances."¹¹⁷ These governments will often disregard the existence of institutional checks on their authority—particularly with the judiciary—or actually dismantle the democratic checks that were already in place, as seen with Hungary.¹¹⁸ These actions delegitimize national legal systems and endanger pluralism both within governance and the country. Second, illiberal democracies will employ the "dictatorship of law," originally coined by Vladimir Putin¹¹⁹ to describe "the adoption of laws that are so vaguely written as to give the authorities wide discretion in applying them to regime opponents."¹²⁰ Generally, these vague laws are paired with a weakened court system saturated with régime supporters that manipulate the legal system to carry out the régime's political agenda.¹²¹ Finally, illiberal democracies frequently invoke the doctrine of absolute sovereignty in order to insulate the state from international obligations and "criticism of restrictions on the press, the smothering of civil society, the persecution of political opposition, and the repression of minority groups."¹²² Sovereignty rhetoric is also deployed against international organizations, such as the United Nations or the European Union, that challenge state actions that run counter to international law and legal norms.¹²³

3. *Anti-Intellectualism*

The final characteristic of illiberal democracies is anti-intellectualism. The term "anti-intellectualism" was coined in Richard Hofstadter's

¹¹⁶ MILL, *supra* note 73, at 7.

¹¹⁷ PUDDINGTON, *supra* note 74, at 7.

¹¹⁸ See *infra* Part II.D (discussing the dismantling of the Constitutional Court's jurisdiction by the Fidesz party).

¹¹⁹ *Russia's Dictatorship of Law*, N.Y. TIMES (Nov. 20, 2010), <https://www.nytimes.com/2010/11/21/opinion/21sun2.html>. Putin's "dictatorship of law" is exemplified in the case of Boris Berezovsky, a Russian oligarch who had helped finance Yeltsen's reelection. In 2003, Berezovsky was granted political asylum by the United Kingdom and in 2013 was found dead in his home. His death remains an open investigation. Mary Dejevsky, *The Weird World of Boris Berezovsky: Alexander Litvinenko's Inquest Has Provided an Intriguing Insight into the Dead Tycoon*, INDEPENDENT (Mar. 18, 2015), <https://www.independent.co.uk/news/world/europe/the-weird-world-of-boris-berezovsky-alexander-litvinenko-s-inquest-has-provided-an-intriguing-insight-10117927.html>.

¹²⁰ PUDDINGTON, *supra* note 74, at 7–8.

¹²¹ *Id.* at 8 ("Such measures are typically paired with a court system that uses law merely to justify political instructions from the executive branch, making a mockery of due process and international conceptions of the rule of law.").

¹²² *Id.* at 7.

¹²³ *Id.*

Anti-Intellectualism in American Life to describe the “resentment and suspicion of the life of the mind and of those who are considered to represent it; and a disposition constantly to minimize that value of life.”¹²⁴ Anti-intellectuals that operate within populist political structures espouse anti-elitist and anti-rationalist¹²⁵ attitudes. Rational discourse is inextricably linked to values protected by constitutional liberalism, including those of free speech, assembly, and academic freedom.¹²⁶ Although Hofstadter’s book was written in response to McCarthyism in the United States,¹²⁷ his general framework of anti-intellectual thought can be transferred to the disdain for the intelligentsia expressed by authoritarians around the world.

Authoritarian governments instrumentalize anti-intellectualism to suppress political dissent by systematically removing the intelligentsia from power and public life.¹²⁸ Critical discourse and free thought, core components of that intellectual life, can undermine authoritarian projects by vocalizing opposition. Hannah Arendt reflects: “Intellectual, spiritual, and artistic initiative is as dangerous to totalitarianism as the gangster initiative of the mob, and both are more dangerous than mere political opposition.”¹²⁹ Authoritarian governments “seek[] to undermine public discourse by attacking and devaluing education, expertise, and language.”¹³⁰ By restricting access to education and spheres of critical

¹²⁴ RICHARD HOFSTADTER, *ANTI-INTELLECTUALISM IN AMERICAN LIFE* 27 (1963). Hofstadter also recognizes the difficulty in defining the term: “One reason that anti-intellectualism has not even been clearly defined is that its very vagueness makes it more serviceable in controversy as an epithet.” *Id.* at 26.

¹²⁵ In this context, anti-rationalism is a refusal of the “commitment to the value of critical thought and reasoned discourse in general,” not to be confused with anti-rationalist philosophical doctrine. Daniel Rigney, *Three Kinds of Anti-Intellectualism: Rethinking Hofstadter*, 61 *SOC. INQUIRY* 434, 436 (1991).

¹²⁶ *Id.* at 440 (“Rational discourse has its social bases in a constitutional system that protects free speech and assembly, in an adversarial system of political and judicial decision-making, in the institutions of scientific and scholarly inquiry and academic freedom, and in an emerging class of intelligentsia for whom the ‘culture of critical discourse’ is a shared ideology.”).

¹²⁷ HOFSTADTER, *supra* note 124, at 17–18 (“Primarily it was McCarthyism which aroused the fear that the critical mind was at a ruinous discount in this country. Of course, intellectuals were not the only targets of McCarthy’s constant denotations—he was after bigger game—but intellectuals were in the line of fire, and it seemed to give special rejoicing to his followers when they were hit.”).

¹²⁸ For example, the Czechoslovak Socialist Republic imprisoned philosopher and dissident, Václav Havel, numerous times between 1977 and 1989 before he became the first Czechoslovak president following the collapse of the communist régime. *Vaclav Havel: Timeline of the Former Czech President*, TELEGRAPH (Dec. 18, 2011, 1:46 PM), <https://www.telegraph.co.uk/news/worldnews/europe/czechrepublic/8964070/Vaclav-Havel-timeline-of-the-former-Czech-president.html>. Another example: Antonio Gramsci, an Italian Marxist philosopher, was sentenced to twenty years imprisonment under the Mussolini régime where he died in a medical clinic while serving his sentence. *Antonio Gramsci*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/biography/Antonio-Gramsci> (last visited Mar. 23, 2019).

¹²⁹ ARENDT, *supra* note 53, at 339.

¹³⁰ JASON STANLEY, *HOW FASCISM WORKS: THE POLITICS OF US AND THEM* 36 (2018).

debate, the capacity for intelligent discourse is limited, allowing the government to promote their single, “legitimate” ideology.¹³¹ The very presence of critical academic discourse threatens the collective narratives and mythologies constructed to support the nation-state, especially when these narratives are recently constructed and do not conform to actual history.

When respected, free intellectual criticism may hold more weight than other forms of opposition, because of its ability to destabilize the flimsy theoretical grounds that authoritarian régimes use to legitimize their rule. Régimes, however, can also use a perversion of the university to their advantage to prop up fascistic ideology.¹³² The university campus has become a battleground site for illiberal attacks on free thought, both at home and abroad.¹³³ Professors, students, disciplines, and universities are frequently targeted by illiberal régimes as dangerous voices that work to “indoctrinate” the nation’s children.¹³⁴ At the same time, régimes suppress critical viewpoints and manipulate the education system to reify mythic narratives of the nation-state as fact. Under these hyper-nationalist régimes, “the function of the education system is to glorify the mythic past, elevating the achievements of members of the nation and obscuring the perspectives and histories of those who do not belong.”¹³⁵ Disciplines such as gender studies are frequently attacked by far-right nationalist movements as undermining the traditions of the nation and its patriarchal ideology¹³⁶ and instead, disciplines that indoctrinate “hierarchal norms and national tradition”¹³⁷ are exalted by the régime. Higher education generally is depicted as an elitist institution symbolic of excess.¹³⁸ By rejecting and

¹³¹ See *id.* (“In fascist ideology, there is only one legitimate viewpoint, that of the dominant nation.”).

¹³² See *id.* (“Education therefore either poses a grave threat to fascism or becomes a pillar of support for the mythical nation.”).

¹³³ See *infra* note 367 (describing recent attempts by governments to limit academic freedom).

¹³⁴ Marxist thought tends to become the academic bogeyman for the far-right. Take, for example, “dangerous” university, course, and professor watchlists, like those promulgated by David Horowitz. See STANLEY, *supra* note 130, at 38–39 (“In 2006, Horowitz published a book, *The Professors*, naming the ‘101 most dangerous professors in America,’ a list of leftist and liberal professors, many of whom were supporters of Palestinian rights. In 2009, he published another book, *One-Party Classroom*, with a list of the ‘150 most dangerous courses in America.’”).

¹³⁵ *Id.* at 47.

¹³⁶ See *id.* at 42–43 (analyzing motives of the far-right in attacking gender studies). Particular anti-intellectual attacks on feminism and gender studies date back to Nazi-peddled myths that “feminism was a Jewish conspiracy to destroy fertility among Aryan women.” *Id.* at 43–44.

¹³⁷ *Id.* at 48.

¹³⁸ See *id.* at 37, 56 (“The media largely ignored these motivations [of the Black Lives Matter movement] and, representing protesting black students as an angry mob, used the situation as an opportunity to foment rage against the supposed liberal political excesses of the university. . . . In fascist politics, universities are debased in public discourse, and academics are undermined as legitimate sources of knowledge and expertise, represented as radical ‘Marxists’ or ‘feminists’ spreading a leftist ideological agenda under the guise of research.”); see also HOFSTADTER, *supra* note

mocking the value of academic expertise, the régime disrupts reality and inserts its own one-dimensional “reality.”¹³⁹ When the régime “is successful, its audience is left with a destabilized sense of loss, and a well of mistrust and anger against those who it has been told are responsible for this loss.”¹⁴⁰ By delegitimizing and forcibly targeting academics and universities, illiberal régimes aim to stall the possibility for robust debate and silence their critics. As such, anti-intellectualism remains in the toolkit of modern authoritarian leaders and their illiberal democracies. This is exemplified in the targeting of higher education institutions by modern authoritarian leaders in Central European countries, such as Hungary and Poland, as well as all over the world.

II. THE HUNGARIAN SITUATION

A. *What is Central Europe?*

This Paper investigates how illiberal democracy has developed in Hungary. To analyze how illiberal democracy has proliferated in Hungary, it is imperative to understand the historical conditions under which norms of governance and national image have developed in the region. But first, this begs the question: What is Central Europe?

Hungary is located in Central Europe—a region of small nation-states whose very existence is constantly under threat from larger surrounding powers.¹⁴¹ Since the inception of the Cold War, Europe is often viewed as a dichotomy between Western and Eastern Europe, leaving little regard for the nations that lie somewhere in between.¹⁴² Following the Second World War, nations whose cultures were traditionally associated with Western European values, such as Hungary and Czechoslovakia, found themselves on the Eastern side of the Iron Curtain. Czech author Milan Kundera described this experience in “The Tragedy of Central Europe.”¹⁴³ As a result of the sudden partition of some Central European nations, “three

124, at 53 (“Intellectuals, it may be held [by anti-intellectuals], are pretentious, conceited, effeminate, and snobbish; and very likely immoral, dangerous, and subversive.”).

¹³⁹ *Id.* at 57.

¹⁴⁰ *Id.*

¹⁴¹ See Milan Kundera, *Die Weltliteratur: How We Read One Another*, NEW YORKER (Jan. 1, 2007), <https://www.newyorker.com/magazine/2007/01/08/die-weltliteratur> (“What distinguishes the small nations from the large is not the quantitative criterion of the number of their inhabitants; it is something deeper. For the small nations, existence is not a self-evident certainty but always a question, a wager, a risk; they are on the defensive against History, that force which is bigger than they, which does not take them into account, which does not even notice them.”).

¹⁴² Stephen Shulman, *Challenging the Civic/Ethnic and West/East Dichotomies in the Study of Nationalism*, 35 COMP. POL. STUD. 554, 582–83 (2002) (“[T]he traditional civic-West/ethnic-East argument is a gross simplification of concepts of nationhood in the West, Central Europe, and Eastern Europe.”).

¹⁴³ Milan Kundera, *The Tragedy of Central Europe*, N.Y. REV. BOOKS, Apr. 26, 1984, at 33.

fundamental situations developed in Europe after [the Second World War]: that of Western Europe, that of Eastern Europe, and, most complicated, that of the part of Europe situated geographically in the center—culturally in the West and politically in the East.”¹⁴⁴ Kundera characterized Central Europe as being “[b]oxed in by the Germans on one side and the Russians on the other”¹⁴⁵ and as “the least known and the most fragile part of the West,”¹⁴⁶ despite Central Europe’s wide contributions to the “European canon” from intellectuals such as Sigmund Freud, Béla Bartok, and Franz Kafka. Following the First World War, Central Europe was “transformed into a region of small, weak states, whose vulnerability ensured first Hitler’s conquest and ultimately Stalin’s triumph.”¹⁴⁷ Kundera argues that Central Europe is defined not by political power, but by its culture: “the great common situations that reassemble peoples, regroup them in ever new ways along the imaginary and ever-changing boundaries that mark a realm inhabited by the same memories, the same problems and conflicts, the same common tradition.”¹⁴⁸ Despite the vast cultural contributions made to “Western European culture” by Central Europe, as soon as the Iron Curtain closed around Central Europe, Western Europe was incapable of understanding the region as anything more than its politics, which was decidedly Eastern European.¹⁴⁹ But, Soviet usurpation was far more than a political struggle—it was also an attack on Central European civilization itself. The revolts in response to these existential attacks on Central European civilization were led by the intelligentsia¹⁵⁰ as a “struggle to preserve [Central European] identity—or, to put it another way, to preserve their Westernness.”¹⁵¹ But, because the region became regarded as an Eastern political régime, “Europe [had not] noticed the disappearance of its cultural home because Europe no longer perceive[d] its unity as a cultural unity.”¹⁵² This struggle for identity was completely ignored by Western Europe and, yet again, Central Europe was forgotten by its cultural brethren.¹⁵³ Kundera’s tragedy—that Central European nations had all but

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 34.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 35.

¹⁴⁹ *Id.* at 37.

¹⁵⁰ *Id.* These revolts “were prepared, shaped, realized by novels, poetry, theater, cinema, historiography, literary reviews, popular comedy and cabaret, philosophical discussions—that is, by culture.” *Id.*

¹⁵¹ *Id.* at 34.

¹⁵² *Id.* at 36.

¹⁵³ *Id.*

vanished from the map of Western Europe—rests not on the Soviet Union, but on Western European nations for abandoning them.¹⁵⁴

Kundera ultimately defines Central Europe as “[a]n uncertain zone of small nations between Russia and Germany.”¹⁵⁵ Unlike their neighbors, “the small nation is one whose very existence may be put in question at any moment; a small nation can disappear and it knows it.”¹⁵⁶ At the time of writing, all of Central Europe, except Austria, had been swallowed up by the Soviet Union.¹⁵⁷ Kundera argues that once the majority of Central Europe was subjugated by the Soviet Union, the region was forgotten by Western Europe.¹⁵⁸ Leading up to the true independence of Central European states, the region faced immense political strife: Nazi invasion, a long stretch of failed revolutions, and finally, Soviet domination. Even prior to the Second World War, Hungary’s struggles were often overlooked by the larger European community. Unlike larger Western nations, such as the United Kingdom, France, or Germany, the histories of these small Central European nations have been “turbulent and fragmented.”¹⁵⁹ Their histories, including Hungary’s, have been ones of frequent invasion and in turn, “[t]heir traditions of statehood have been weaker and less continuous than those of the larger European nations.”¹⁶⁰ Hungary’s history includes long occupations by the Mongols, the Ottoman Empire, the Hapsburg Empire, the Third Reich, and the Soviet Union.¹⁶¹ Unlike their western neighbors, Central European nation-states experience constant existential threat. István Bibó aptly reflects:

“The death of the nation” or “the annihilation of the nation” rings empty in West European ears; Westerners can imagine extermination, subjection, or slowly going native, but political “annihilation” overnight is sheer bombast to them, yet it is a *palpable reality* for the nations of Eastern Europe. Here there is no need to exterminate or expel a nation to

¹⁵⁴ *Id.* at 38 (“The real tragedy for Central Europe, then, is not Russia but Europe: this Europe that represented a value so great that the director of the Hungarian News Agency was ready to die for it, and for which he did indeed die. . . . He did not suspect that the sentence he was sending by telex beyond the borders of his flat country would seem outmoded and would not be understood.”).

¹⁵⁵ *Id.* at 35.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 36.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 34.

¹⁶⁰ *Id.*

¹⁶¹ *Hungary Timeline*, BBC NEWS (Feb. 14, 2012), http://news.bbc.co.uk/2/hi/europe/country_profiles/1054642.stm.

make it feel endangered; it is enough to *call its existence into doubt* with a sufficiently aggressive rhetoric.¹⁶²

This persistent existential threat to independent nationhood has impacted the democratic development of Central Europe and “has been the decisive factor in making democracy and democratic development waver in these countries.”¹⁶³ The embedded identity of the existential anxiety of the nation-state guides political and legal decision-making and may even interfere with Hungary’s democratic prospects.

B. *Hungarian Political History (Hapsburg—1989)*

Developments in Hungarian history uniquely positioned the nation to be susceptible to the rise of the far-right. Wilkin contends that “the roots of illiberalism in the modern world-system are a reaction, in part, to the threat that liberalism presented to established social hierarchies, secular or religious”¹⁶⁴ in the seventeenth and eighteenth centuries. Elements of illiberalism have been persistent throughout Hungarian political history. Wilkin argues that four major periods of history shaped the development of the Hungarian nation-state and its relationship to illiberalism. First, the restoration of the monarchy and the establishment of the Austro-Hungarian Empire, following the defeat of the democratic Hungarian Revolution of 1848, was reactionary and anti-modern.¹⁶⁵ Monarchical systems are, unsurprisingly, adverse to the classical liberal values that threaten the social hierarchies entrenched in traditional monarchies.¹⁶⁶ Second, the crumbling of the Austro-Hungarian Empire after the First World War bred animosity within the nation-state after “it suffered drastic loss of territory and population through the Treaty of Trianon.”¹⁶⁷ Hungary’s experience during the inter-war period mirrors that of other Central Powers, like Germany, whose reactionary fascist forces rose to power as a response to the aftermath of the war.¹⁶⁸ This massive loss of territory “left a lasting

¹⁶² ISTVÁN BIBÓ, *The Miseries of East European Small States*, in THE ART OF PEACEMAKING 130, 150 (Iván Zoltán Dénes ed., Péter Pásztor trans., 2015).

¹⁶³ *Id.* at 151.

¹⁶⁴ Peter Wilkin, *The Rise of ‘Illiberal’ Democracy: The Orbánization of Hungarian Political Culture*, 24 J. WORLD-SYS. RES. 5, 9 (2018).

¹⁶⁵ *Id.* at 13.

¹⁶⁶ *Id.* at 13–14 (“[The Hungarian monarchy was] understandably[] deeply hostile to liberal ideas of universality and equality, preferring instead to entrench social life in traditional social hierarchies shaped through the church and respect for secular authority in the forms of the King and the aristocracy.”).

¹⁶⁷ *Id.* at 14.

¹⁶⁸ ARENDT, *supra* note 53, at 308 (“After the first World War, a deeply anti-democratic, predictatorial wave of semitotalitarian and totalitarian movements swept Europe; Fascist movements spread from Italy to nearly all Central and Eastern European countries . . .”). Also note, Austro-Hungary lost two-thirds of its territory and two-thirds of its population. *Treaty of Trianon*,

legacy of resentment amongst the country's right-wing social forces, which still manifests itself rhetorically today with both Fidesz and Jobbik.¹⁶⁹ Third, Hungary's experience with fascism and Nazism during the Second World War impacted the rise of illiberal democracy in the country today by bringing anti-Semitism, racism, and other prejudices to the fore.¹⁷⁰ The Second World War presented an opportunity for Hungary to reclaim its lost territory; but, by 1944, Hungary had become a puppet state for Nazi Germany after a *coup d'état* by the far-right fascist Arrow Cross Party.¹⁷¹ Finally, after the defeat of the Axis forces in the Second World War, the Soviet Union army invaded Hungary and instituted another authoritarian régime. Between 1945 and 1989, Hungary was occupied by Soviet forces that quashed democratic revolutions¹⁷² and decimated civil society.¹⁷³ These eras of Hungarian history shaped its development as a nation-state in the *longue durée* and influenced the rise of Orbán's illiberal democratic project.

C. *Fledgling Democracy: The Interim Years (1989–2010)*

Prime Minister Orbán's rise to power directly resulted from the missteps of the governments in power during the democratic transitional period.¹⁷⁴ Just as democracy emerged, neo-fascist and anti-Semitic

ENCYCLOPÆDIA BRITANNICA, <https://www.britannica.com/event/Treaty-of-Trianon> (accessed Mar. 19, 2019).

¹⁶⁹ Wilkin, *supra* note 164, at 14.

¹⁷⁰ *Id.* at 15 (noting the role that Hungarians and the Hungarian government played in the Final Solution).

¹⁷¹ JACK R. FISCHER, HISTORICAL DICTIONARY OF THE HOLOCAUST 122–23 (1999). Ferenc Szálasi, the Prime Minister of Hungary and leader of the Arrow Cross Party, was found guilty for war crimes and was sentenced to death. Militiamen of the Arrow Cross Party conducted a reign of terror that resulted in the violent murder of many Hungarian Jews. *Hungary After the German Occupation*, U.S. HOLOCAUST MEMORIAL MUSEUM, <https://encyclopedia.ushmm.org/content/en/article/hungary-after-the-german-occupation> (accessed Mar. 18, 2019). By the end of the Second World War, an estimated 563,000 Hungarian Jews died at the hands of the Arrow Cross Party and the Nazi régime. *Id.* Wilkin notes that Szálasi's "enthusiasm for the Final Solution was implacable. . . . [A]t times SS officers in Hungary had to restrain the Hungarian forces from their enthusiastic slaughter of the Jewish population." Wilkin, *supra* note 164, at 15.

¹⁷² See Ben Cosgrove, *A Rip in the Iron Curtain: Photos From the Hungarian Revolution, 1956*, TIME (Oct. 22, 2013), <http://time.com/3878232/the-hungarian-revolution-of-1956-photos-from-the-streets-of-budapest/> (collecting photographs from the 1956 Hungarian Revolution).

¹⁷³ See Péter Krasztev, *Social Responses to the "Hybridization" of the Political System: The Case of Hungary in the Central and Eastern European Context*, in THE HUNGARIAN PATIENT: SOCIAL OPPOSITION TO AN ILLIBERAL DEMOCRACY 167, 171 (Péter Krasztev et al. eds., 2015) ("The historian Stephen Kotkin has called state socialist societies 'uncivic societies,' and the Hungarian example certainly proves this: the Kádár regime was efficient enough to make opposition seem futile and thus eliminate social solidarity and autonomy, and these attitudes still live on today.").

¹⁷⁴ András Bozóki, *Broken Democracy, Predatory State, and Nationalist Populism*, in THE HUNGARIAN PATIENT: SOCIAL OPPOSITION TO AN ILLIBERAL DEMOCRACY 3, 4 (Péter Krasztev et al. eds., 2015) ("This antiliberal turn did not emerge out of the blue: it was a direct response to the hectic

movements, fueled by nationalism, simultaneously rose to mainstream discourse.¹⁷⁵ This Section will explore how internal failures in Hungarian government and external factors influenced the rise of illiberal democracy under Orbán by using Huntington's factors¹⁷⁶ that contributed to prior reverse waves of democracy. The most relevant factors for this period of time are: (1) the weakness of democratic values; (2) severe economic setbacks; (3) social and political polarization; (4) the exclusion of non-elites by elites; and (5) the breakdown of law and order.¹⁷⁷

The weakness of democratic values and increasing political polarization in the transitional period were instrumental in prompting the rise of the far-right. The post-Cold War Hungarian democratic process was deeply flawed. Bozóki identifies three institutional factors that contributed to Orbán's success: the qualified majority vote, informal rulemaking, and partocracy.¹⁷⁸ The Hungarian Founding Fathers placed an emphasis on "strengthen[ing] the new democratic order, its stability, and its governability"¹⁷⁹ when drafting the new democratic institutional system. The Founding Fathers attempted to achieve these goals by instituting required qualified majority votes in many arenas of the decision-making process.¹⁸⁰ Bozóki writes:

These measures created a democracy in which, between elections, the ruling government's power became almost cemented. It became nearly impossible to remove an incumbent government from the outside; however, this simultaneously made effective governance more difficult. The government in power, due to the large number of qualified majority rules, had to rely on the *opposition* to make decisions on basic issues. Paradoxically, the constitution thus both greatly increased the power *and* limited the political responsibility of the government.¹⁸¹

By overvaluing stability, the constitutional system that existed between 1990 and 2010 created systematic inefficiencies that, in turn, contributed to the devaluing of democracy. Bozóki also remarks that Hungary's history of occupation "produced a political culture characterized by a prevalence of

reforms implemented by previous governments between 2006 and 2010, as well as the ensuing corruption and economic crisis.").

¹⁷⁵ Wilkin, *supra* note 164, at 18.

¹⁷⁶ HUNTINGTON, *supra* note 5, at 290–91.

¹⁷⁷ *Id.*

¹⁷⁸ Bozóki, *supra* note 174, at 5–9.

¹⁷⁹ *Id.* at 5.

¹⁸⁰ *Id.* ("[T]he Founding Fathers believed that they could safeguard freedom by increasing the number of decisions that required a qualified majority vote.").

¹⁸¹ *Id.*

informal practices and a lack of institutional accountability.”¹⁸² In order to cope with occupation, a dual system of contradictory formal and informal rules developed whereby the official rules of the occupier would be followed while finding loopholes and cutting corners so as to undermine official rule.¹⁸³ This dual rule system persisted throughout the Kádár era of communism and, Bozóki argues, made the system more bearable than those of its neighbors.¹⁸⁴ Because of Hungary’s long history of occupation, Bozóki contends that “in 1989 Hungarians broke only with the institutional system of dictatorship, not with the customs and informal procedures associated with that system.”¹⁸⁵ While this dual rule system was vital during occupation, the persistent culture of rule-bending delegitimized democratic rule in post-occupation life. Finally, “partocracy,” the form of government by which a single party rules hegemonically,¹⁸⁶ is culturally endemic in Hungarian politics and at odds with democratic norms.¹⁸⁷ The anti-pluralism that current day Hungary is experiencing is not novel to Orbán’s régime and in fact predates it. Political parties, including those on the left, dominate all aspects of the political process: public discourse, civic duties, and candidate nominations were all controlled by the major political parties.¹⁸⁸ Thus, the Hungarian democratic system, in its most free state, was highly politicized and plagued by the excessive control of areas of public life that should have remained free from government interference

¹⁸² *Id.* at 6.

¹⁸³ *Id.* (“Hungarians learned that they only had to feign obedience to the rules imposed upon them by foreign invaders: below the surface, they established a system of informal rules governing society and culture. . . . Therefore, Hungarians learned to get their way around these rules in a conniving fashion, finding loopholes and cutting corners, and this behavioral pattern remains deeply engrained in Hungarian society.”).

¹⁸⁴ *Id.* (“The reason [the régime] became more livable is that the system often did not take its own rules seriously. . . . Under Kádárisim, citizens grew accustomed to those procedures that made the dictatorship bearable. For Hungarians, the old system was not nearly as bad as it had been for the Poles, the Czechs, or the Romanians.”).

¹⁸⁵ *Id.*

¹⁸⁶ Wilkin, *supra* note 164, at 18–19 (“Hungary’s political system [was] dominated by either neoliberal parties such as the reform communists and liberal parties (MSZP and SZDSZ) who governed between 1994–[19]98 and 2002–2010; or conservative-nationalist coalitions led initially by the MDF who governed from 1990–[19]94, with Fidesz in office between 1998–2002, leading a coalition including the Christian Democrats and the Smallholders Party.”).

¹⁸⁷ See Bozóki, *supra* note 174, at 7 (“During the second decade of democracy in Hungary, party politics superseded almost all other aspects.”).

¹⁸⁸ See *id.* at 7–8 (“Public discourse was based on party allegiance. . . . It was the parties that organized movements; it was the parties that established public benefit foundations, professional groups, and civic circles. . . . The particular features of the Hungarian political system—including the collection of candidate nomination slips, the high threshold to enter parliament, the large number of regulatory areas in which a qualified majority is required in order to create new laws, the opacity of political party financing, the privileged position of political party foundations, and so on—facilitated the survival of existing parties and made it difficult for new political forces to enter parliament.”).

but were instead controlled by the dominant political party.¹⁸⁹ Partocracy only served to further polarize the Hungarian public in an already turbulent time, creating an atmosphere of a “cold civil war” between those on the left and right.¹⁹⁰ Unchanged, all three practices made the chances of a lasting, stable democracy dead on arrival.

Throughout the late 1990s and persisting to the current day, Hungary has faced many economic crises. As the formerly communist nation transitioned to democracy, Hungary also transitioned to capitalism. Hungary slowly privatized and the transition resulted in an unstable economy.¹⁹¹ Hungary experienced rapid deindustrialization, widening regional inequalities.¹⁹² As a result of this rough transition, Hungary became increasingly reliant on external financial investments, primarily from the European Union and Japan.¹⁹³ In Hungary’s first decade of democracy, the country “experienced periods of massive contraction,”¹⁹⁴ but began to steady itself in the new millennium.¹⁹⁵ This quasi-stability was quickly quashed by the unpopular austerity measures pushed through by the MSZP-SZDSZ government¹⁹⁶ in 2006 and the global recession in 2008.¹⁹⁷ Tóth and Grajczjár speculate that “the recovery period was too short to solve the internal societal tensions, poverty and underemployment, to bridge the wide gap between the eastern and western parts of the country, and to stop the deterioration of public institutions.”¹⁹⁸ These austerity measures promoted by elite members of the MSZP-SZDSZ coalition ran contrary to what the majority of Hungarians actually desired.¹⁹⁹ The political scene only became more polarized when a confidential speech by then-Prime Minister Ferenc Gyurcsány in

¹⁸⁹ *Id.* at 8–9 (“The Hungarian system was characterized by a highly politicized society and by the excessive sway that political parties held in various areas of public life.”).

¹⁹⁰ *Id.* at 8 (describing the depths of political polarization in Hungary as a result of partocracy).

¹⁹¹ Wilkin, *supra* note 164, at 20.

¹⁹² *Id.* at 18.

¹⁹³ *Id.* at 20.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ The MSZP-SZDSZ was a coalition government between the Hungarian Socialist Party (Magyar Szocialista Párt) and the Alliance of Free Democrats’ (Szabad Demokraták Szövetsége – a Magyar Liberális Párt) party which held a close majority before Fidesz won a majority. Csaba Nikolenyi, *Strategic Co-Ordination in the 2002 Hungarian Election*, 56 EUR.-ASIA STUD. 1041, 1041 (2004).

¹⁹⁷ Bozóki, *supra* note 174, at 11.

¹⁹⁸ András Tóth & István Grajczjár, *The Rise of the Radical Right in Hungary*, in *THE HUNGARIAN PATIENT: SOCIAL OPPOSITION TO AN ILLIBERAL DEMOCRACY* 133, 158 (Péter Krasztev & Jon Van Til eds., 2015).

¹⁹⁹ Wilkin, *supra* note 164, at 19 (“The problem was that these austerity policies were against what the majority of the Hungarian population actually wanted at the time.”).

Balatonönszöd was leaked.²⁰⁰ In the speech, Gyurcsány said that he and the MSZP-SZDSZ government “had knowingly lied to the public concerning the economic situation in Hungary,”²⁰¹ causing an eruption of “violent street protests”²⁰² on the anniversary of the 1956 Revolution.²⁰³ This economic crisis was intensified by the global recession and occurred “when the government was rapidly losing its political credibility domestically.”²⁰⁴ The mishandling of the economic crisis decimated support for MSZP and opened the door for far-right parties to rise to prominence.²⁰⁵ In addition to Fidesz, the Jobbik party, a radical far-right party that has been described as neo-fascist,²⁰⁶ emerged during the economic crises.²⁰⁷ By the 2010 parliamentary elections, support for MSZP dropped to 20 percent²⁰⁸ while Jobbik captured 16.67 percent of the vote, becoming the third largest party in parliament.²⁰⁹

Finally, during the interim period of democratization, far-right parties peddled “law and order” narratives that targeted the Roma.²¹⁰ Tóth and Grajczjár argue that anti-Roma “law and order” rhetoric entered public discourse in 2006 after a tragic murder was committed by a group of Roma in Olaszliszka.²¹¹ This event was the catalyst for an outpouring of anti-Roma sentiments, with Jobbik leading this discourse as “protector of

²⁰⁰ Philipp Karl, *Network Analysis of Right-Wing Extremism in Hungary*, in MINORITIES UNDER ATTACK: OTHERING AND RIGHT-WING EXTREMISM IN SOUTHEAST EUROPEAN SOCIETIES 221, 222 (Sebastian Goll et al. eds., 2016).

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ Tóth & Grajczjár, *supra* note 198, at 137.

²⁰⁴ Bozóki, *supra* note 174, at 11.

²⁰⁵ *Id.* at 3, 4.

²⁰⁶ *Jobbik*, COUNTER EXTREMISM PROJECT, https://www.counterextremism.com/sites/default/files/threat_pdf/Jobbik-12172018.pdf (last visited Mar. 23, 2019).

²⁰⁷ PETER KREKÓ ET AL., BROOKINGS, ANTI-MUSLIM POPULISM IN HUNGARY: FROM THE MARGINS TO THE MAINSTREAM (2019), <https://www.brookings.edu/research/anti-muslim-populism-in-hungary-from-the-margins-to-the-mainstream/>.

²⁰⁸ Tóth & Grajczjár, *supra* note 198, at 137.

²⁰⁹ *Id.* at 139.

²¹⁰ The Roma are a richly diverse, historically nomadic group of people who likely originated in northern India and migrated towards Europe in approximately the tenth or eleventh centuries. Throughout their history, the Roma have been subjected to abuse, enslavement, and extermination. In Romania, the Roma were enslaved between the fourteenth century until the 1850s. In Nazi Germany, between 250,000 and 500,000 Roma perished in the Holocaust. An additional note: while the Roma are also referred to as “Gypsies,” this is a widely recognized slur and will be omitted from quoted materials, except for in the case of direct quotes from far-right speeches. Samira Shackle, *Roma Holocaust: Amid Rising Hate, ‘Forgotten’ Victims Remembered*, ALJAZEERA (Oct. 30, 2019), <https://www.aljazeera.com/indepth/features/roma-holocaust-rising-hate-forgotten-victims-remembered-191029173851099.html>; see Adrian Marsh, *Gypsies, Roma, Travellers: An Animated History*, OPEN SOCIETY FOUND. (June 5, 2013), <https://www.opensocietyfoundations.org/voices/gypsies-roma-travellers-animated-history> (detailing the history of the Roma people).

²¹¹ Tóth & Grajczjár, *supra* note 198, at 138.

‘the honest, hardworking common people’²¹² against “Gypsy crime.”²¹³ The Jobbik propagation of this racist discourse was ultimately successful in widening their voter base and bringing far-right politics to the fore: “[M]any [Hungarians] felt themselves being finally liberated from the left-liberal stranglehold of political correctness and allowed themselves to give vent to long-suppressed resentment, naming the causes of their real or imagined grievances.”²¹⁴ In 2007, Jobbik spurred the creation of the Hungarian Guard (Magyar Gárda),²¹⁵ a paramilitary group dedicated to the “defence” of Hungary against “Gypsy criminality.”²¹⁶ Other anti-Roma extremist groups, such as Véderő and Szebb Jövőért, scheduled marches so hostile and aggressive that they caused Roma populations to evacuate towns, such as Gyöngyöspata, in fear for their safety.²¹⁷ This xenophobic mainstream law and order rhetoric is echoed in the contemporary far-right discourse surrounding the refugee crisis.²¹⁸

D. *Rise of Hungarian Illiberal Democracy (2010–present)*

The tumultuous period of democratic transition preceding Fidesz’s régime greatly contributed to the party’s triumph.²¹⁹ The nascent illiberal democracy became cemented as Hungary’s new system of governance through sweeping unilateral legal reforms. These reforms enshrined the illiberal principles of majoritarianism, absolute sovereignty, dictatorship of law, nationalism, and anti-intellectualism.²²⁰ The following section will examine how Orbán instrumentalized the law to claim the government for his own party and apply it to the typical characteristics of an illiberal democracy. The cumulative effect of these reforms is demonstrated in *Freedom House*’s decision to downgrade Hungary’s freedom ranking from “free” to “partially free” in 2019.²²¹ These legal reforms attacked six arenas

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ The Magyar Gárda was disbanded by Metropolitan Court of Budapest in 2009. After unsuccessful appeals in the national judicial system, the Magyar Gárda brought their case to the European Court of Human Rights and alleged that the national decision violated freedom of assembly as guaranteed by the European Convention of Human Rights. The court held that Article 11 was not violated and upheld the judgments of the Hungarian national courts. *Vona v. Hungary*, App. No. 35943/10, Eur. Ct. H.R. (2013) paras. 16–18, 72.

²¹⁶ *Id.* para. 10.

²¹⁷ Karl, *supra* note 200, at 223.

²¹⁸ *See infra* Part II.D.

²¹⁹ *See supra* Part II.C.

²²⁰ *Id.*

²²¹ FREEDOM HOUSE, FREEDOM IN THE WORLD 2019: HUNGARY (2019), <https://freedomhouse.org/country/hungary/freedom-world/2019> (“Hungary’s status declined from Free to Partially Free due to sustained attacks on the country’s democratic institutions by Prime Minister Viktor Orbán’s Fidesz party, which has used its parliamentary supermajority to impose restrictions on or assert control over the opposition, the media, religious groups, academia, NGOs, the courts, asylum

of democracy: the Constitution, the Constitutional Court, the presidency, independent institutions, the media, and civil society.

Before Orbán's Fidesz came into power, Hungary "was a liberal democracy characterized by a multiparty system, free elections, representational government, a strong opposition, free media, strong, and credible institutions that protected the rule of law (*i.e.*, the Constitutional Court and Ombudsman's Office), and independent courts."²²² In stark contrast, the Orbán government approaches law not as an entity to be respected, but as a body to be manipulated in order to fit the needs of Fidesz's political agenda.²²³ This is first and foremost exemplified with Fidesz's unilateral rewriting of the Constitution. The framers of the old Constitution, drafted after the fall of communism, had two concerns when structuring the new government: first, "a fractured parliament in which small parties would be unable to form stable majority coalitions" and second, "a deeply entrenched constitution that would be too hard to change once the new democrats figured out how they wanted to design their political institutions."²²⁴ The resulting constitution was one that favored larger parties with a provision allowing parliament to alter any part of the Constitution so long as they secure a two-thirds majority.²²⁵ This fatal flaw in the Constitution revealed itself after Fidesz secured 53 percent of the popular vote, translating into 68 percent of the seats in parliament.²²⁶ This meant that Fidesz was now capable of unilaterally amending the Constitution. In their first year in power, Fidesz amended the Constitution twelve times, altering more than fifty separate provisions and weakening any and all checks and balances.²²⁷ Fidesz used their two-thirds majority power to erase the last measure restraining constitutional amendments: the requirement of "a four-fifths vote of parliament to set the rules for writing a new constitution."²²⁸ The elimination of this rule allowed Fidesz to draft a completely new constitution while barring any opposing voices from sitting at the table.

seekers, and the private sector since 2010." Cf. FREEDOM HOUSE, FREEDOM IN THE WORLD 2018: HUNGARY (2018), <https://freedomhouse.org/country/hungary/freedom-world/2018> (displaying a 72/100 Global Freedom Score and designating Hungary as "free").

²²² András Bozóki, *Occupy the State: The Orbán Regime in Hungary*, 19 DEBATE: J. CONTEMP. CENT. & E. EUR. 649, 649 (2011).

²²³ See *id.* at 651 ("[T]he new government saw the 1989 Constitution as a heap of purely technical rules, which Orbán has since shaped to fit the needs of his current political agenda. If any of his new laws proved to be unconstitutional, it was not the law, but the Constitution that had to be changed.").

²²⁴ Miklós Bánkuti, Gábor Halmi & Kim Lane Scheppelle, *Hungary's Illiberal Turn: Disabling the Constitution*, in THE HUNGARIAN PATIENT: SOCIAL OPPOSITION TO AN ILLIBERAL DEMOCRACY 37, 37 (Péter Krasztev & Jon Van Til eds., 2015).

²²⁵ *Id.* at 37–38.

²²⁶ *Id.* at 38.

²²⁷ *Id.*

²²⁸ *Id.*

Now in control of the executive and legislative branches, Fidesz's next target was the Constitutional Court. Before Fidesz's reign, the Constitutional Court was a powerful check on the government.²²⁹ First, Fidesz utilized its newfound amendment powers to change the judicial nomination process by allowing the party in power to nominate candidates to be elected to the court by a two-thirds majority, completely eliminating pluralism from the process.²³⁰ The Constitution had previously "required a majority of parliamentary parties to agree to a nomination and then a two-thirds vote of parliament's members to elect the nominee to the court."²³¹ Second, Fidesz attacked the Constitutional Court's jurisdiction after it declared a retroactive tax law that punished members of the former MSZP-SZDSZ government unconstitutional²³² and retaliated by "amending the Constitution and limiting the Constitutional Court's jurisdiction."²³³ Parliament barred the Constitutional Court from reviewing any law about fiscal matters unless it affects "rights to life, dignity, data privacy, thought, conscience, religion, and citizenship."²³⁴ Finally, the Fidesz government packed the Constitutional Court and delegated themselves the power to name seven of the fifteen judges as well as the chairperson of the Constitutional Court.²³⁵ As to be expected, all of the nominees are Fidesz-affiliates.²³⁶

In addition to the Constitutional Court, Fidesz uprooted the appointment procedure for judgeships in every single court in the country. Before Fidesz, lower court judges were independently appointed by a panel of their fellow judges.²³⁷ Under the new system, Fidesz established the National Judicial Office (KIH) to oversee the judiciary and holds "the power to select new judges, to promote or demote any judge, to begin

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.* ("In order to plug gaping budget holes, the Fidesz government established a 98 percent retroactive tax on the customary departing bonuses of those who had left public employment in the preceding five years. The Constitutional Court, before it could be packed with a working majority of new judges, struck down this tax as unconstitutional." (footnote omitted)).

²³³ Bozóki, *Occupy the State*, *supra* note 222, at 651.

²³⁴ Bánkuti et al., *supra* note 224, at 39. Bánkuti et al. note that the Constitutional Court is explicitly barred from reviewing "budget or tax laws if they infringe other rights that are much easier to limit with fiscal measures, such as the right to property, equality under the law, the prohibition against retroactive legislation, and the guarantee of fair judicial procedure." *Id.* Fidesz also sought to nationalize private pensions, directly resulting in the European Court of Human Rights being flooded with 8000 cases on the matter due to the Constitutional Court's inability to act. *Id.*

²³⁵ See Bozóki, *Occupy the State*, *supra* note 222, at 651–52 ("In addition, the number of judges was increased from eleven to fifteen, and the Court was packed with right-wing personalities and former politicians known to be close to Fidesz.").

²³⁶ *Id.*

²³⁷ Bánkuti et al., *supra* note 224, at 42.

disciplinary proceedings, and to select the leaders of each of the courts.²³⁸ The president of the KIH has a nine year term and is selected by a two-thirds majority vote in parliament, again guaranteeing that the head of this “independent” body would be a friend of Fidesz.²³⁹ In this case, current Chairperson Tünde Handó is quite literally “a close friend of Prime Minister Orbán and the wife of József Szájer,” the Vice President of Fidesz and principal architect of the new constitution.²⁴⁰ In contrast to other legal systems, Chairperson Handó also has the sole authority to reassign cases throughout the country at will.²⁴¹ As such, the legitimacy of the entire Hungarian judicial system has been decimated in under a decade.

The checks delegated to the president’s office and purportedly independent accountability institutions have also been delegitimized. First, under the old constitution, the president’s main check was that of the suspensive veto power.²⁴² In the case of the president’s office, parliament simply elects hardline Fidesz supporters, like Pál Schmitt and János Áder, who refuse to veto Fidesz legislation.²⁴³ Second, Hungary’s old ombudsman system comprised of “four separate ombudsmen with separate staffs and independent jurisdictions”²⁴⁴ that monitored human rights issues. Now, there is a single parliamentary commissioner for fundamental rights that operates with a severely reduced staff.²⁴⁵ The Data Protection Supervisor was abolished and a new, non-independent office was established.²⁴⁶ In 2014, the Court of Justice of the European Union found that in doing so, Hungary failed to fulfill its obligations under the 1995 Data Protection Directive.²⁴⁷ Third, the State Audit Office, once an independent body with the power to investigate the misuse of public funds, is now led by a former Fidesz MP with no professional auditing experience.²⁴⁸ Fourth, the National Election Commission (NVB), the

²³⁸ *Id.*

²³⁹ *Id.* at 42–43.

²⁴⁰ *Id.* at 42.

²⁴¹ *Id.* at 43.

²⁴² *Id.* at 40.

²⁴³ *Id.*

²⁴⁴ *Id.* at 44.

²⁴⁵ *Id.*

²⁴⁶ Case C-288/12, *Comm’n v. Hung.*, 2014 E.C.R. I-nyr, <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2012:227:0015:0016:EN:PDF>.

²⁴⁷ Bánkuti et al., *supra* note 224, at 44.

²⁴⁸ *Id.* at 39. Independent Hungarian media allege that the State Audit Office is selectively enforcing auditing regulation aimed at harming opposition parties, while dismissing like investigations on Fidesz. Jobbik is facing fines of 662 million forints (\$2.4 million) for illegal in-kind campaign contributions, while three parties are facing fines for “renting office space below market rates”: The Democratic Coalition, 16 million forints (\$58,000); Együtt, 16 million forints (\$58,000); and Politics Can Be Different 8.8 million forints (\$31,900). Christopher Adam, *The Hungarian State Audit Office’s Assault on Democracy*, HUNGARIAN FREE PRESS (Jan. 9, 2018, 3:35 PM), <http://hungarianfreepress.com/2018/01/09/the-hungarian-state-audit-offices-assault-on-democracy/>.

independent body charged with regulating election law, has been filled with a Fidesz majority.²⁴⁹ In addition to monitoring elections and drawing electoral maps,²⁵⁰ the NVB also has the power to decide what referenda will be voted on in elections.²⁵¹ This is particularly notable as referenda are one of the most substantial areas that civil society can attempt to influence the Fidesz government.²⁵² Finally, the new constitution created the Budget Council that may “veto any budget produced by parliament that adds even a single forint [(0.004¢)] to the national debt.”²⁵³ The terms for Budget Council officials exceed that of a standard parliamentary election cycle, therefore allowing the Budget Council to “exercise dead-hand control over future elected governments.”²⁵⁴ Even worse, “if parliament fails to agree on a budget by March 31 of each year, then the president may dissolve parliament and call new elections.”²⁵⁵ If the Budget Council utilizes its veto power right before the deadline, it could force a new election.²⁵⁶ Thus, Fidesz’s partocracy extends beyond the three branches of government and invades purportedly independent institutions as well.

Fidesz has usurped power horizontally by controlling the vast majority of mainstream media. The Fidesz government established the National Media and Infocommunications Authority (NMHH), a regulatory agency and an “independent” Media Council, charged with monitoring media outlets and fining outlets that do not have “balanced” news programming.²⁵⁷ Like other “independent” government agencies, Orbán appointed a former Fidesz MP to lead the NMHH, and parliament elected Fidesz loyalists fill all the seats on the Media Council.²⁵⁸ Although the Hungarian Constitution guarantees freedom of speech and freedom of the press,²⁵⁹ the public television broadcaster is biased in favor of Fidesz and

²⁴⁹ Bánkuti et al., *supra* note 224, at 39.

²⁵⁰ Fidesz’s ability to modify election law without cooperation from outside parties has allowed them to manipulate previously independent institutions to preserve their two-thirds majority. For example, in 2014, Fidesz won only 44 percent of the popular vote, but still maintained their two-thirds majority in parliament. Martino Comelli & Vera Hovárth, *What Orbán Knows and His Enemies Don’t*, JACOBIN MAG. (Mar. 9, 2018), <https://www.jacobinmag.com/2018/03/viktor-orban-hungary-fidesz-authoritarian-opposition>.

²⁵¹ Bánkuti et al., *supra* note 224, at 39.

²⁵² *Id.* at 44.

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.* at 40.

²⁵⁸ *Id.*

²⁵⁹ MAGYARORSZÁG ALAPTÖRVÉNYE [THE FUNDAMENTAL LAW OF HUNGARY], ALAPTÖRVÉNY art. IX [hereinafter HUNGARIAN CONSTITUTION] (“(1) Everyone shall have the right to freedom of expression. (2) Hungary shall recognize and protect the freedom and diversity of the press, and shall ensure the conditions for the free dissemination of information necessary for the formation of democratic public opinion. . . . (6) The detailed rules relating to the freedom of the press and the organ

actively undermines the opposition; Fidesz selectively awards advertising contracts and radio station frequencies to supporters and pressures critical news outlets into silence or closes them.²⁶⁰ *Népszabadság*, the largest opposition newspaper, was unexpectedly suspended from operation after it uncovered Fidesz scandals and its parent company was subsequently sold to Optimus Press, a firm owned by Fidesz allies.²⁶¹ The firm has no plans to reopen *Népszabadság*.²⁶² Fidesz affiliates and pro-government media currently dominate the market,²⁶³ and much of the opposition media has been pushed to the internet.²⁶⁴ Approximately 90 percent of all media in Hungary is owned by either the government or allies of Fidesz and use their publications to push pro-government views.²⁶⁵ For example, a study by Democracy Reporting International and Mérték Media Monitor studied broadcasts by television stations about the refugee resettlement program referendum in Hungary, supported by the European Union, and found that 91 percent of programming by public television stations took anti-referendum positions.²⁶⁶ Currently, Freedom House has ranked Hungary's freedom of the press as only "partly free."²⁶⁷

supervising media services, press products and the communications market shall be laid down in a cardinal Act.”).

²⁶⁰ FREEDOM HOUSE, FREEDOM OF THE PRESS 2017: HUNGARY (2017), <https://www.refworld.org/docid/59fc67e6a.html>. Additionally, the “donation” of most major media outlets—over four hundred—to a pro-Fidesz foundation run by Orbán’s childhood friend is yet another example that Orbán’s “economic patriotism” is merely a guise for his crony capitalism. Of course, this mass donation to the Central European Press and Media Foundation must be approved by regulatory authorities (led by Orbán appointees). If approved, “the deal will place most leading private Hungarian outlets under the control of a single, state-friendly entity.” Patrick Kingsley, *Orban and His Allies Cement Control of Hungary's News Media*, N.Y. TIMES (Nov. 29, 2018), <https://www.nytimes.com/2018/11/29/world/europe/hungary-orban-media.html>.

²⁶¹ FREEDOM HOUSE, FREEDOM OF THE PRESS 2017, *supra* note 260.

²⁶² *Id.*

²⁶³ *Id.* (“Optimus Press bought the publisher Mediaworks, which had recently merged with Pannon Lapok Társasága, which controlled numerous regional newspapers. The business weekly Figyelő, was acquired by Mária Schmidt, a government ally. *Ripost*, a progovernment print tabloid, was launched in the fall of 2016. The free daily newspaper *Metropol* shut down in June 2016, after it lost a contract that had allowed its distribution at metro stations. A government-affiliated free newspaper, *Lokál*, soon emerged in its place. The license of Hungary’s only national private radio station, Class FM, was not renewed in 2016.”).

²⁶⁴ See Krasztev, *supra* note 173, at 176 (“Independent media have been relegated to the Internet.”).

²⁶⁵ Marius Dragomir, *The State of Hungarian Media: Endgame*, MEDIA@LSE (Aug. 29, 2017), <https://blogs.lse.ac.uk/mediapolicyproject/2017/08/29/the-state-of-hungarian-media-endgame/>. A second study demonstrated that in 2015, only 31 Hungarian news outlets took a pro-government stance, but by 2018, the number increased to 500. In addition, many of these news sources were owned by fourteen pro-Fidesz oligarchs, with Lőrinc Mészáros owning 205 media titles. Bátorfy Attila, *Infographic: Explore the Media Empire Friendly to the Hungarian Government*, ATLATSZO (May 30, 2018), <https://english.atlatszo.hu/2018/01/16/infographic-explore-the-media-empire-friendly-to-the-hungarian-government/>.

²⁶⁶ FREEDOM HOUSE, FREEDOM OF THE PRESS 2017, *supra* note 260.

²⁶⁷ *Id.*

Hungarian civil society is also under siege. Like Fidesz's strategy with the media, the party prevents civil society from genuinely functioning by smothering oppositional NGOs and replacing them with Fidesz allies or by discrediting them based on their affiliation with George Soros.²⁶⁸ Scholars have argued that Hungary's "historically based tradition of a strong central state, the restored (or rather surviving) authoritarian hierarchies . . . successfully hindered the emergence of civil independence and autonomy."²⁶⁹ Prior to the Fidesz régime, civil society traditions in Hungary were beginning to grow, for example, with the success of impartial government watchdog groups.²⁷⁰ Many of these civil society organizations have a high resource dependency and rely on government grants to operate.²⁷¹ Once Orbán took power in 2010, "the system of partiality became legitimized, and grant distribution became overtly biased as a 'necessary restoration' of the national and traditional value system, which strictly excluded a number of values, critical voices, and watchdog views."²⁷² In effect, the Orbán government was able to "dismiss" opposition organizations by withdrawing funding and "replace" them with new organizations run by Fidesz allies.²⁷³ Government Decree 49/2011 (III.30.) was enacted to achieve similar aims by ordering "direct provision of financial support through some of the ministries to 525 organizations, visibly recognizable from their names as NGOs that highlight national, family, and other traditional values and share these with the government parties."²⁷⁴

Fidesz is keen to target "opponent" NGOs that are funded through Soros's charitable contributions and Open Society Foundations. The Hungarian far-right perpetuates anti-Semitic myths claiming that Soros is part of an international conspiracy to force "globalism" on unwilling nations vis-à-vis civil society organizations.²⁷⁵ In 2018, Fidesz passed a law informally known as the "Stop Soros" law that both imposes "a 25

²⁶⁸ See *infra* Part IV.B for a more in-depth discussion of George Soros and Fidesz.

²⁶⁹ Ágnes Kövér, *Captured by State and Church: Civil Society in Democratic Hungary*, in *THE HUNGARIAN PATIENT: SOCIAL OPPOSITION TO AN ILLIBERAL DEMOCRACY* 81, 84 (Péter Krasztev & Jon Van Til eds., 2015).

²⁷⁰ See Zsolt Enyedi, *Democratic Backsliding and Academic Freedom in Hungary*, 16 *PERSP. ON POL.* 1067, 1070 (2018) ("These watchdogs have been critical of government practices for many years, no matter which party was in power.").

²⁷¹ Kövér, *supra* note 269, at 82–83.

²⁷² *Id.* at 83.

²⁷³ *Id.* at 84 ("As a result, hundreds of formerly successful organizations disappeared, a process which can be followed by searching the web, where the virtual corpses of once-flourishing NGOs are scattered.").

²⁷⁴ *Id.* at 83–84.

²⁷⁵ See Enyedi, *supra* note 270, at 1070 ("The 'observation' that civil-society organizations backed by Soros are part of a global conspiracy is not unique to Hungary.").

percent tax on foreign donations to NGOs that back migration”²⁷⁶ and also criminalizes the vague practice of “promoting and supporting illegal migration.”²⁷⁷ This is another instance in which the illiberal value of absolute sovereignty appears. In a recent speech, Orbán said: “We are up against media outlets maintained by foreign concerns and domestic oligarchs, professional hired activists, troublemaking protest organizers, and a chain of NGOs financed by an international speculator, summed up by and embodied in the name George Soros.”²⁷⁸ We can again observe the law and order rhetoric, similar to the anti-Roma beliefs discussed earlier,²⁷⁹ but this time deployed as a weapon against humanitarian aid organizations.

The rhetoric put forth by Fidesz and Prime Minister Orbán is steeped in ethnic nationalism and easily distributed as propaganda vis-à-vis the enormous amount of media either owned by the state or by Fidesz allies. The content of these messages is comprised “of nationalism and Christian and patriarchal family values with demands for law and order.”²⁸⁰ The Constitution’s preamble has been revised to emphasize themes of “Christian values, national history, and a united nation as a cultural and political community with state interests.”²⁸¹ Much of Orbán’s rhetoric invokes notions of “the family,” both with regard to valuing the ethnic Hungarian nuclear family²⁸² as well as referring to the nation-state as a

²⁷⁶ Krisztina Than, *Civil Organizations in Hungary Brace for Government Crackdown on NGOs*, REUTERS (Apr. 25, 2018, 10:33 AM), <https://www.reuters.com/article/us-hungary-orban-ngos/civil-organizations-in-hungary-brace-for-government-crackdown-on-ngos-idUSKBN1HW1ZN>.

²⁷⁷ Zack Beauchamp, *Hungary Just Passed a “Stop Soros” Law That Makes It Illegal to Help Undocumented Migrants*, VOX (June 22, 2018, 1:30 PM), <https://www.vox.com/policy-and-politics/2018/6/22/17493070/hungary-stop-soros-orban>.

²⁷⁸ Prime Minister Viktor Orbán, Orbán Viktor’s Ceremonial Speech on the 170th Anniversary of the Hungarian Revolution of 1848 (Mar. 15, 2018). Orbán then went on to claim:

[T]here are those who want to take our country from us. Not with the stroke of a pen, has happened one hundred years ago at Trianon; now they want us to voluntarily hand our country over to others They want us to hand it over to foreigners coming from other continents, who do not speak our language, and who do not respect our culture, our laws or our way of life: people who want to replace what is ours with what is theirs. . . . Those who do not halt immigration at their borders are lost: slowly but surely they are consumed. External forces and international powers want to force all this upon us, with the help of their allies here in our country.

Id.

²⁷⁹ See *supra* Part II.C (discussing how “far right parties peddled ‘law and order’ narratives that targeted the Roma”).

²⁸⁰ András Bozóki, *The Illusion of Inclusion: Configurations of Populism in Hungary*, in THINKING THROUGH TRANSITION: LIBERAL DEMOCRACY, AUTHORITARIAN PASTS, AND INTELLECTUAL HISTORY IN EAST CENTRAL EUROPE AFTER 1989, at 275, 308 (Michal Kopeček & Piotr Wciślik eds., 2015).

²⁸¹ *Id.*

²⁸² See, e.g., Viktor Orbán, Prime Minister, Hung., Speech at the 29th Bálványos Summer Open University and Student Camp (July 29, 2018) (“Our second tenet is that every country has the right to

family to be protected.²⁸³ Frequently, Orbán characterizes Hungary as a homogenous Christian nation under siege by refugees—and that “migration and mass population movements are bad, dangerous things which [Hungary] want[s] no part of. . . . In consequence [of migration] we will not be able to keep Hungary as it has been for the past 1,100 years.”²⁸⁴ Orbán’s speeches conjure images of the Hungarian fictive ethnicity: that of a traditional white, Christian Magyar that embraces traditional values and rejects the moral decline of the West. This fictive Hungarian rejects the multiculturalism “imposed” on them by the West: “We must state that we do not want to be diverse and do not want to be mixed: we do not want our own colour, traditions and national culture to be mixed with those of others. . . . We do not want to be a diverse country. We want to be how we became 1,100 years ago here in the Carpathian Basin.”²⁸⁵ This fictive ethnicity can be seen in play when a 2010 law granted citizenship rights, including the right to vote in elections, to ethnic Hungarians living in neighboring countries. Although many of these newly enfranchised ethnic Hungarians have never visited the country, they account for approximately ten percent of the electorate and vote for Fidesz at a rate of 95 percent.²⁸⁶

The Orbán administration is also in the process of reconstructing Hungary’s history. The much-hated Treaty of Trianon that caused Hungary to lose two-thirds of its territory after the First World War has become a rallying cry for the far-right. In 2016, the central square of Pomáz, a small town outside of Budapest, was renamed “Trianon Square” and features a monument that is a map of greater Hungary prior to its loss of territory.²⁸⁷ Since Orbán’s 2010 election, the régime has sought to rewrite the nation’s past vis-à-vis the construction of monuments that glorify what were once

defend the traditional family model, and is entitled to assert that every child has the right to a mother and a father.”).

²⁸³ See, e.g., Viktor Orbán, Prime Minister, Hung., “State of the Nation” Address (Feb. 10, 2019), <https://visegradpost.com/en/2019/02/11/prime-minister-viktor-orbans-state-of-the-nation-address-full-speech/> (“Thirty years after the fall of communism, on the eve of a pan-European parliamentary election, Europe finds itself in the position that we must stand up for our Hungarian identity, for our Christian identity, protect our families and communities, and also protect our freedom. . . . We have our own future which is the continuation of the lives of our parents and grandparents, the preservation of the traditions of a thousand years, the protection of our economy, our families and our Christian culture.”).

²⁸⁴ Viktor Orbán, Prime Minister, Hung., Speech at the Annual General Meeting of the Association of Cities with County Rights (Feb. 8, 2018).

²⁸⁵ *Id.*

²⁸⁶ See Lili Bayer, *Viktor Orbán Courts Voters Beyond ‘Fortress Hungary’*, POLITICO (Aug. 22, 2017), <https://www.politico.eu/article/viktor-orban-courts-voters-in-transylvania-romania-hungarian-election-2018/> (“In Hungary’s 2014 election, over 95 percent of votes cast by non-domestic citizens went to Fidesz.”).

²⁸⁷ Rosa Schwartzburg & Imre Szijarto, *The Ghosts of a Fascist Past*, JACOBIN (Jan. 26, 2019), https://www.jacobinmag.com/2019/01/hungary-fidesz-viktor-orban-memory-history?fbclid=IwAR0PXU19MpJhYbFGAsoQxodTt-HP_PUjIHipRrXnZakPUj0eumF1g7d4T4MA.

considered dark times in history. These include monuments celebrating Miklós Horthy, a right-wing leader and ally of Hitler, and the 2018 replacement of a statue of Imre Nagy, the martyred leader of the 1956 Revolution, with Gyula Gömbös, a fascist Prime Minister during the interwar period.²⁸⁸ Other monuments erected under the régime downplay Hungary's culpability in the Holocaust.²⁸⁹ Orbán and Fidesz are in the midst of constructing a new collective mythology of the nation-state, through both legal instruments and national symbols, in order to support their régime of illiberal democracy. Their new conception of what constitutes a Hungarian and Hungarian values has been deployed against intellectuals and academia in order to delegitimize their opposition and tighten their grip on public discourse.

E. *Emergency and Temporal Uncertainty in Hungarian Illiberal Democracy*

Orbán, like authoritarian leaders across the globe, received another opportunity to consolidate power when the novel coronavirus arrived in Hungary.²⁹⁰ On March 30, Parliament approved the "Corona Bill," allowing Orbán to indefinitely rule by decree with effectively unchecked power.²⁹¹ Under rule by decree, Orbán may bypass the national assembly completely.²⁹² The law granting rule by decree also stalled all elections and created two to five year prison sentences for those that "distort facts" or publish "false information."²⁹³ Abuse of emergency power is not

²⁸⁸ *Id.*

²⁸⁹ *Id.* One such monument erected under the cover of night in Budapest's Szabadság tér (Freedom Square) depicts "innocent Hungary" as Archangel Gabriel being attacked by the German imperial eagle and has been the site of a counterprotest exhibit due to the memorial's downplaying of Hungary's complacency in the Holocaust. Former Prime Minister Ferenc Gyurcsány said "with this gesture, Orbán is falsifying [history] and dishonouring all the Jewish, Roma and gay people who died in the Holocaust." This monument prompted thirty Jewish U.S. congressmen to pen a letter to Orbán asking him to cancel the construction of the monument. Orbán responded to the criticism by claiming that the memorial is "not a Holocaust memorial but a tribute to all the victims of the German occupation." Daniel Nolan, *German Occupation Memorial Completed Under Cover of Darkness*, BUDAPEST BEACON (July 21, 2014), <https://budapestbeacon.com/german-occupation-memorial-completed-under-cover-of-darkness/>.

²⁹⁰ WHO Coronavirus Disease (COVID-19) Dashboard: Hungary, WORLD HEALTH ORG., <https://covid19.who.int/region/euro/country/hu> (last accessed Oct. 30, 2020).

²⁹¹ Imre Szijarto & Rosa Schwartzburg, *Viktor Orbán Is Using the Coronavirus Emergency to Crush Minorities*, JACOBIN MAG. (Apr. 8, 2020), <https://jacobinmag.com/2020/04/viktor-orban-coronavirus-pandemic-hungary-authoritarianism>; Guy Verhofstadt, *Is COVID-19 Killing Democracy?*, BALKAN INSIGHT (May 18, 2020), <https://balkaninsight.com/2020/05/18/is-covid-19-killing-democracy/>.

²⁹² Verhofstadt, *supra* note 291.

²⁹³ Edward Szekeres, *Hungary 'No Longer a Democracy' After Coronavirus Law*, BALKAN INSIGHT (Mar. 31, 2020), <https://balkaninsight.com/2020/03/31/hungary-no-longer-a-democracy-after-coronavirus-law/>.

unfamiliar to Orbán. The government, for example, has renewed the state of emergency declared for a “crisis situation due to mass migration” eight times since the European refugee crisis began in 2015.²⁹⁴ Subverting the division between emergency and normalcy serves two functions: to expand executive authority beyond legislature oversight and to normalize the régime. Through enduring vacillations between emergency and normalcy, “the authorities may turn to rule by decree as easily as switching on a lightbulb.”²⁹⁵

When authoritarian governments fabricate indefinite emergency, diminished speech and protest rights often follow. For Orbán, the Corona Bill serves as an effective mechanism to suppress speech while painting dissenters as active threats to the health of the nation. Opposition MP Tímea Szabó argued that in reality, the Corona Bill lends “a free hand to do away with even what’s left of the press and practically imprison journalists, doctors, and opposition lawmakers if we say things that you don’t like—namely, *the truth*.”²⁹⁶ Since the “fake news” and assembly components of the Corona Bill passed, police launched about one hundred investigations against individuals, though cases have yet to make their way into court.²⁹⁷ The Fidesz government has also instrumentalized COVID-19 precautions to limit protest and assembly. For example, protesters in a series of car demonstrations against Orbán’s rule by decree were subjected to extreme fines of up to 750,000 forints (about \$2,500).²⁹⁸ Protesters were fined under an array of charges ranging from violating traffic laws to COVID-19 assembly restrictions.²⁹⁹ Under illiberal rule, official sites of

²⁹⁴ Edit Inotai, *Pandemic-Hit Hungary Harps on About ‘Migrant Crisis’*, BALKAN INSIGHT (Mar. 19, 2020), <https://balkaninsight.com/2020/03/19/pandemic-hit-hungary-harps-on-about-migrant-crisis/>; Akos Keller-Alant, *Hungarian Police Accused of Abusing Powers to Arrest Critics*, BALKAN INSIGHT (May 13, 2020), <https://balkaninsight.com/2020/05/13/hungarian-police-accused-of-abusing-powers-to-arrest-critics/>.

²⁹⁵ Orsolya Lehotai, *Hungary’s Democracy Is Still Under Threat*, FOREIGN POL’Y (July 17, 2020), <https://foreignpolicy.com/2020/07/17/hungary-democracy-still-under-threat-orban-state-public-health-emergency-decree/>.

²⁹⁶ Szijarto & Schwartzburg, *supra* note 291.

²⁹⁷ Keller-Alant, *supra* note 294. For example, the police arrested two people in rural Hungary for criticizing Orbán’s COVID-19 response on Facebook. *Id.* One detainee, János Csóka-Szücs, is disabled and was left without transportation home after his release. Csóka-Szücs was forced to walk home without his cell phone or money, which were still in police custody. *Id.*

²⁹⁸ Keller-Alant, *supra* note 294. Szijarto notes that these fines are “several times the average worker’s monthly income, and more than enough to cause serious difficulties even for relatively well-off households.” Imre Szijarto, *The Decline of Democracy in Hungary Is a Troubling Vision of the Future*, JACOBIN (June 14, 2020), <https://jacobinmag.com/6/2020/viktor-orban-hungary-democracy-covid-19>.

²⁹⁹ Gabriella Horn, *Car Honking Protests Cancelled Due to Astronomical Fines Handed Out By Budapest Police*, ATLATSZO (May 25, 2020), <https://english.atlatszo.hu/2020/05/25/car-honking-protests-cancelled-due-to-astronomical-fines-handed-out-by-budapest-police/>.

public discourse such as media³⁰⁰ and universities³⁰¹ are no longer free. The advent of COVID-19 allows illiberal leaders to restrict access to the abstract and literal town square under the façade of public health.³⁰²

This state of public health emergency also granted Fidesz the ability to quickly pass expansive measures unrelated to COVID-19. On March 31, just one day after the Corona Bill passed, Deputy Prime Minister Zsolt Semjén, introduced and passed an omnibus bill proposing fifty-seven legislative changes.³⁰³ Although this bill was passed under the guise of COVID-19, in reality, it functions to further consolidate power.³⁰⁴ First, the bill financially enriches Orbán and his allies by ordering the construction of Orbán's pet projects: "the construction of new museum buildings in one of the capital's biggest public parks"³⁰⁵ and a new Budapest-Belgrade railway.³⁰⁶ Second, the bill expands illiberal control over the arts by packing the theater supervisory board with government appointees.³⁰⁷ Third, the bill attempted to suspend municipal autonomy.³⁰⁸ Finally, the bill "forces trans people to have the same gender as they were assigned at birth and bans gender reassignment altogether."³⁰⁹ This aspect of the bill not only functions as a literal attack against transgender Hungarians, but also as an abstract attack against their identities.³¹⁰ Denying trans existence as deviant to the traditional heteropatriarchal norms of the Hungarian nation-state serves to Otherize from "the people" of the imagined community.³¹¹ This dual role of the new law serves two purposes: cast aside trans people as non-members of the community and routinely out them in regular aspects of national life.³¹²

³⁰⁰ See *supra* notes 258–70 and accompanying text (analyzing media freedom under the Orbán régime).

³⁰¹ *Infra* Part III.

³⁰² Szijarto & Schwartzburg, *supra* note 291.

³⁰³ *Id.*

³⁰⁴ *Id.*

³⁰⁵ *Id.*

³⁰⁶ *Id.*

³⁰⁷ Szijarto & Schwartzburg, *supra* note 291. Régime control over the arts is directly related to the anti-intellectual aspect of illiberal democracies. By restricting the arts and academic freedom, authoritarians seek to manipulate and regulate national discourse. See *supra* Part I.C.3.

³⁰⁸ This portion of the omnibus bill was reversed after extensive outcry from the opposition, "who made significant gains in the last municipal contests in fall 2019, including [Gergely] Karácsony's election in Budapest" as mayor. Szijarto & Schwartzburg, *supra* note 291.

³⁰⁹ *Id.*

³¹⁰ See Szijarto, *supra* note 298 ("Since Hungarian society at large is anything but trans accepting, this move is not only an attack on trans people's right to their 'identities' in an abstract sense. It is likely to turn regular interactions with society into recurring rituals of humiliation.").

³¹¹ *Supra* Part I.C.1.

³¹² See Szijarto, *supra* note 298 ("This means outing trans people not only to employers and landlords but even to receptionists and cashiers, whenever they use a credit card.").

On June 16, proposed legislation ending Orbán's rule by decree passed unopposed.³¹³ The Orbán government issued about one hundred decrees since March, many of which are completely unrelated to COVID-19 measures.³¹⁴ This brief reprieve would not last for long: Keeping in line with tradition, Parliament again pushed the nation into a state of emergency. This time, Parliament passed legislation allowing Orbán to enter a "state of medical emergency" and revert back to rule by decree absent a mandated end date.³¹⁵ Under a state of health emergency, the government may restrict fundamental rights for a maximum of six months, but critics argue that they may be extended indefinitely in practice.³¹⁶

The Hungarian Helsinki Committee wrote that the formal June 20 end to rule by decree "is nothing but an optical illusion: if the Bills are adopted in their present form, that will allow the government to again rule by decree for an indefinite period of time, this time without even the minimal constitutional safeguards."³¹⁷ This looming state of emergency destabilizes any normalcy that existed before the régime. Crisis legitimizes authoritarian control. "When the coronavirus arrived in Hungary, Orbán used it to illustrate that he was already fully in control of his system."³¹⁸ These states of emergency are cast as an offensive against the perceived invasions of disease or the Other³¹⁹ into the imagined community.³²⁰ The aim is that the régime citizens will more readily accept losing civil liberties—the "liberalism"³²¹ of the old liberal democratic order—and the tightening authoritarian grasp will begin to feel natural. Orbán's illiberal democracy is emblematic of this threat. Suspended in the strings of state

³¹³ Lehotai, *supra* note 295.

³¹⁴ Shaun Walker, *Hungarian Government to End Orbán's Rule-By-Decree Legislation*, GUARDIAN (May 26, 2020), <https://www.theguardian.com/world/2020/may/26/hungarian-government-to-end-orbans-rule-by-decree-legislation-emergency-coronavirus>.

³¹⁵ *Never-Ending Story?*, HUNGARIAN HELSINKI COMMITTEE (May 27, 2020), <https://www.helsinki.hu/en/never-ending-story/>. The legislation also amended the Disaster Management Act to authorize "the government [to] order any measures it deems necessary if the measures previously specified by parliament are inadequate." *Id.*

³¹⁶ *Id.*

³¹⁷ *Id.*

³¹⁸ Nick Schiffrin & Layla Quran, *How Authoritarianism Has Spread Since the Coronavirus Pandemic Began*, PBS (Aug. 4, 2020), <https://www.pbs.org/newshour/show/how-authoritarianism-has-spread-since-the-coronavirus-pandemic-began>.

³¹⁹ Edward Said's theory of Orientalism explains that European societies Otherize non-European societies in order to legitimize their imperialist projects. EDWARD SAID, *ORIENTALISM* 7 (1994) ("Orientalism is never far from what Denys Hay has called the idea of Europe, a collective notion identifying 'us' Europeans as against all 'those' non-Europeans, and indeed it can be argued that the major component in European culture is precisely what made that culture hegemonic both in and outside Europe: the idea of European identity as a superior one in comparison with all the non-European peoples and cultures.").

³²⁰ See *supra* Part I.C.1 (applying Benedict Anderson's *Imagined Communities* to illiberal democracy).

³²¹ See *supra* notes 65–73 (explaining liberal democracy and constitutional liberalism).

emergency, the régime order reifies amorphous crises into accepted domination. As such, after the pandemic, we emerge only to find that the system had long collapsed, replaced by hollow illiberal democracies.

III. THE INTERSECTION OF ANTI-INTELLECTUALISM, ILLIBERAL DEMOCRACY, AND ACADEMIC FREEDOM

A. *Lex CEU: A Background*

Central European University (CEU) is a highly-ranked graduate research university in Budapest founded in 1991 by George Soros, Václav Havel, and other intellectual members of the democratic opposition as a direct response to the dissolution of the Soviet Union.³²² Their vision was to establish a university dedicated to promoting the values of open society and democracy as envisioned in Karl Popper's philosophy.³²³ Since its founding, Central European University has been regarded as a liberal intellectual bastion of Central Europe and Hungary. Central European University is accredited both in Hungary and in the state of New York and leads all other Hungarian universities in receiving European research grants. As such, it has become the target of Prime Minister Orbán's attacks on freedom of thought, academic freedom, and liberal opposition.

In April of 2017, the Hungarian parliament adopted amendments to the existing Act CCIV of 2011 on National Higher Education ("Lex CEU").³²⁴ The new criteria for foreign universities operating in Hungary directly targeted only Central European University.³²⁵ The most onerous component of Lex CEU is the requirement of an international agreement between Hungary and the university's country of origin (in CEU's case, America).³²⁶ This requirement is particularly problematic as it "practically means that the right to conduct educational activities will no longer depend on professional criteria (e.g., on the decision of accreditation boards), but on the preferences of the government."³²⁷ This law also requires that all foreign-accredited universities provide higher education services in their country of origin and "restricts the possibility for non-European universities to enter into cooperation with Hungarian universities."³²⁸

³²² *Our Mission*, CENT. EUR. U., <https://www.ceu.edu/about/our-mission> (last visited Jan. 12, 2020); *History*, CENT. EUR. U., <https://www.ceu.edu/about/history> (last visited Jan. 12, 2020).

³²³ *Our Mission*, *supra* note 322.

³²⁴ This law quickly gained the nickname of "Lex CEU" because Central European University (CEU) is the only higher education institution affected by the law.

³²⁵ Enyedi, *supra* note 270, at 1067.

³²⁶ *Id.*

³²⁷ *Id.*

³²⁸ Griff Witte, *Amid Illiberal Revolution in Hungary, a University with U.S. Roots Fights to Stay*, WASH. POST (Sept. 3, 2018, 3:08 PM), <https://www.washingtonpost.com/world/europe/amid-illiberal->

Finally, Lex CEU “eliminates exemptions for work permits and requires that the name of the university differs clearly from the name of already registered universities even in foreign languages.”³²⁹ If a university fails to comply with any aspect of Lex CEU, it will lose its license to operate.³³⁰

Although the stipulations of this amendment appear to be neutral, they disparately impact Central European University. CEU is an American-chartered university that is connected to the Hungarian higher education system via a legal entity called Közép-európai Egyetem.³³¹ The university has a substantial population of non-European professors, primarily from America and Canada, that relied on the recently eliminated work permit exception.³³² In order to fulfil the requirement of an international agreement, the successful negotiation of *two* treaties—one between Hungary and New York state and the other between Hungary and the United States federal government—were now required by January 1, 2018, giving CEU less than a year to comply.³³³

The Orbán government faced immense backlash in response to this absurd law. On April 2, 2017, approximately 10,000 people marched throughout Budapest to parliament in support of CEU.³³⁴ Then, on April 4, parliament voted in favor of Lex CEU in spite of a petition to the government with over 30,000 signatures from 134 different countries.³³⁵ Finally, on April 9, an estimated 80,000 demonstrators took to the streets in peaceful protest, with hundreds of international universities and over twenty Nobel laureates expressing solidarity.³³⁶ Central European University worked with the state of New York and launched an academic exchange program at Bard College in Annandale-on-Hudson, New York. Despite complying with Lex CEU and successfully negotiating a mutually accepted draft agreement with Governor Cuomo, the Orbán government refused to ratify the treaty. This left the university in legal limbo by extending the deadline of compliance to January 1, 2019, prompting international condemnation.³³⁷ Without approval by the Orbán government,

revolution-in-hungary-a-university-with-us-roots-fights-to-stay/2018/09/03/7061771c-a547-11e8-a656-943eefab5daf_story.html?utm_term=.9a2aa60e3ca5; Enyedi, *supra* note 270, at 1067.

³²⁹ Enyedi, *supra* note 270, at 1067.

³³⁰ *Id.*

³³¹ *Id.*

³³² *Id.*

³³³ *Id.* at 1068.

³³⁴ *CEU Thanks Organizers, Supporters of Today's Event*, CENT. EUR. U. (Apr. 2, 2017), <https://www.ceu.edu/node/17917>.

³³⁵ *Timeline of Events*, CENT. EUR. U., <https://www.ceu.edu/istandwithceu/timeline-events> (accessed Mar. 23, 2019).

³³⁶ Enyedi, *supra* note 270, at 1068.

³³⁷ *Id.* (“Widespread public and international criticism of the law followed. During visits to CEU at the height of the crisis, both former German President Joachim Guack and Nobel Prize-winning writer Mario Vargas Llosa, condemned the law. Many other public figures contributed to the growing

the university has been forced to shutter its United States-accredited operations in Budapest and move its students to a satellite campus in an old state hospital on the outskirts of Vienna, Austria for the fall 2019 academic year.³³⁸

B. *Anti-Intellectualism and Illiberal Democracy: A Hungarian Reprise*

Illiberal democracies, our modern authoritarianism, are deeply anti-intellectual. As discussed in Part I, critical intellectual discourse poses a direct threat to authoritarian control.³³⁹ Illiberal leaders like Orbán that espouse populism in their political platform are wont to espouse anti-intellectual rhetoric. Populism can be defined as “[a] thin-centered ideology that considers society to be ultimately separated into two homogenous and antagonistic groups, ‘the pure people’ and ‘the corrupt elite,’ and which argues that politics should be an expression of the *volonté générale* (general will) of the people.”³⁴⁰ Historically, the intelligentsia have been classified as “the elite” and have become the scapegoat for the ire of populist leaders. Other than the general inaccessibility of expensive university degrees to the masses, academia and its intelligentsia are targeted to suppress anti-régime discourse and preemptively neutralize the opposition. This line of thought makes Central European University an ideal target for Orbán. CEU is an institution that was founded with a

worldwide protest. On April 19, nine American senators, including John McCain and Chuck Schumer, sent a letter to Prime Minister Viktor Orbán, arguing that the legislation threatens academic freedom and calling on him to work with CEU to find a solution. The most important political statements came from the European People’s Party (EPP, the center-right bloc in the European Parliament) and the spokesperson for German Chancellor Angela Merkel. The U.S. State Department also expressed its clear support for CEU and for academic freedom, and rejected the threat to an American university abroad. . . . Parallel to American diplomatic efforts, the European Commission condemned the law as a violation of EU regulations and core European values, including academic freedom.”); *see also* Letter from Sen. Dick Durban, Sen. Jeanne Shaheen, Sen. Chris Murphy, Sen. Kirsten Gillibrand, Sen. Amy Klobuchar, Sen. Ron Wyden, Sen. Charles E. Schumer, Sen. Cory A. Booker, Sen. Edward J. Markey, Sen. Bernard Sanders, U.S. Senate, to Ambassador David B. Cornstein (Dec. 20, 2018) (on file with Sen. Dick Durban) (supporting CEU and academic freedom in Hungary); Letter from Dr. Laura Schultz et al., Professor Cognitive Sci., MIT, to H.E. Réka Szemerkényi, Ambassador of Hung. to the U.S. et al. (Mar. 31, 2017) (on file with Central European University) (letter from 1061 cognitive scientists in support of Central European University); *Statements of Support*, CENT. EUR. U., <https://www.ceu.edu/istandwithCEU/support-statements> (accessed Mar. 23, 2019).

³³⁸ *CEU Forced Out of Budapest: To Launch U.S. Degree Programs in Vienna in September 2019*, CENT. EUR. U. (Dec. 3, 2018), <https://www.ceu.edu/article/2018-12-03/ceu-forced-out-budapest-launch-us-degree-programs-vienna-september-2019>; *see also* Rosa Schwartzburg, *School’s Out Forever*, SLATE (Feb. 20, 2019), https://slate.com/news-and-politics/2019/02/authoritarians-education-universities-hungary-brazil-populism.html?via=rss_socialflow_facebook&fbclid=IwAR3kYxKbgCTBPcNH04be6f1cib661ewsRhOgwXvdcCn2d_n3FWetNn5VBk0 (describing CEU’s ousting to Vienna).

³³⁹ ARENDT, *supra* note 53, at 339.

³⁴⁰ CAS MUDDE, *THE OXFORD HANDBOOK OF POPULISM* 29 (Cristóbal Rovira Kaltwasser et al. eds., 2017).

dedication to open society, with programs such as their Nationalism and Gender Studies departments³⁴¹ that directly, and loudly, challenge illiberal democracy. Universities are particularly dangerous to authoritarians because their purpose “is [to] produce knowledge that is often critical of the established ways of doing things And in the social sciences it’s quite dangerous . . . because the knowledge that’s produced is calling into question the habits and ‘ordinary ways’ that we go about doing things.”³⁴² Likewise, the government-controlled press launched a campaign against the “intellectual elite” that attacked philosophers associated with the Georg Lukács School, like Ágnes Heller, by falsely claiming that they had received overly generous government research grants.³⁴³ Authoritarians rely on the closure of critical discourse to create a one-dimensional arena of thought that is uncritical of the régime in order to successfully quell opposition and maintain societal control.

Anti-intellectualism, especially in Europe, is inherently tied to anti-Semitism. Arendt’s history of anti-Semitism in *Origins of Totalitarianism* notes that European nation-states were hostile to Jewish intellectuals in particular as an attempt to prevent Jewish assimilation in the nineteenth century.³⁴⁴ But by the early twentieth century, the most notable Central European intellectuals were Jewish: Sigmund Freud, Edmund Husserl, Gustav Mahler, Franz Kafka, and so on.³⁴⁵ George Soros, the primary founder of Central European University, is a Hungarian-born Jewish financier and billionaire and has been the subject of anti-Semitic conspiracy theories by the Hungarian far-right. Most recently, Fidesz has launched a taxpayer-funded³⁴⁶ campaign against Soros and the European Union that includes peddling the myth that Soros was “allegedly

³⁴¹ *Nationalism Studies Program*, CENT. EUR. U., <https://courses.ceu.edu/unit/nationalism> (accessed Jan. 12, 2020); *Department of Gender Studies*, CENT. EUR. U., <https://courses.ceu.edu/unit/gender> (accessed Jan. 12, 2020).

³⁴² Schwartzburg, *supra* note 338 (quoting interview with Joan Wallach Scott, Professor Emerita at the School of Social Science at the Institute for Advanced Study).

³⁴³ Bozóki, *The Illusion of Inclusion*, *supra* note 280, at 306.

³⁴⁴ ARENDT, *supra* note 53, at 32 (“From then on, the nation-state, equipped with conservative arguments, drew a distinct line between Jews who were needed and wanted and those who were not. Under the pretext of the essential Christian character of the state—what could have been more alien to the enlightened despots!—the growing Jewish intelligentsia could be openly discriminated against without harming the affairs of bankers or businessmen. This kind of discrimination which tried to close the universities to Jews by excluding them from the civil services had the double advantage of indicating that the nation-state valued special services higher than equality, and of preventing, or at least postponing, the birth of a new group of Jews who were of no apparent use to the state and even likely to be assimilated into society.”). Ultimately, this project was a failure: “What the nation-state had once feared so much, the birth of a Jewish intelligentsia, now proceeded at a fantastic pace.” *Id.* at 52.

³⁴⁵ Kundera, *The Tragedy of Central Europe*, *supra* note 143, at 35.

³⁴⁶ Lili Bayer, *Hungary Launches Campaign Targeting Jean-Claude Juncker*, POLITICO (Feb. 18, 2019), <https://www.politico.eu/article/hungary-launches-campaign-targeting-jean-claude-juncker-george-soros/>.

responsible for the wave of migrants to Europe.”³⁴⁷ Deputy Prime Minister Zsolt Semjén claimed in a recent radio interview that: “[T]he Soros-type extreme liberalism which hates Christian traditions and, if possible even more, nation states,”³⁴⁸ is dangerous to Hungarians, and he went on to conclude that “leftist and liberal parties needed to import millions of foreigners in order to defeat their nationalist opponents and, in cooperation with immigrant Islamic forces, to rule the nations of Europe.”³⁴⁹ Jobbik spokesman Ádám Mirkóczki pushed this narrative even further by claiming that high-ranking Fidesz politicians, including Orbán, are implicated in this conspiracy theory due to the Soros funding that they received for their educations.³⁵⁰ The anti-Soros conspiracy theory directly entered the parliamentary debate on Lex CEU when “the minister responsible for education stated that ‘we are committed to use all legal means at our disposal to stop pseudo-civil society spy groups such as the ones funded by George Soros.’”³⁵¹ Although Central European University would still have been a likely target of the Fidesz régime, Soros’s involvement threw fuel into the fire.

C. *Illiberal Legal Challenges to Academic Freedom*

Since Prime Minister Viktor Orbán was elected in 2010, the Fidesz government has centralized education and enacted a wide array of laws that shrink academic freedom in the country.³⁵² Fidesz has pushed through a gradual overhaul of the public education system, slowly growing government influence over school curricula.³⁵³ In 2014, legislation was adopted that permits government-appointed chancellors to make significant financial decisions at public universities,³⁵⁴ and in some cases, the Minister of Education has even “imposed his own candidate for rector of universities and political appointees without any academic record were promoted to professorship at state-controlled universities.”³⁵⁵ Likewise, a slash in government funding for the Hungarian Academy of Science and

³⁴⁷ Enyedi, *supra* note 270, at 1069.

³⁴⁸ *Id.*

³⁴⁹ *Id.* (summarizing the Semjén interview).

³⁵⁰ *Fidesz Gets a Reminder Who Was Funded By George Soros*, JOBBIK (Jan. 27, 2017), https://www.jobbik.com/fidesz_gets_a_reminder_who_was_funded_by_george_soros (“He added that when Szilárd Németh identified Soros’ protégés as organizations and individuals to be ‘cleaned away’, the Fidesz politician forgot to mention that from 1984 through 1994 the Hungarian-born US businessman funded such persons as PM Viktor Orbán and several other individuals with ties to the current government or the ruling party, including Tamás Deutsch, József Szájer, Zsolt Németh, István Stumpf, Zoltán Cséfalvay, József Pálincás, János Áder or László Kövér.”).

³⁵¹ Enyedi, *supra* note 270, at 1070.

³⁵² *Id.* at 1071.

³⁵³ FREEDOM HOUSE, *FREEDOM IN THE WORLD 2018: HUNGARY*, *supra* note 221.

³⁵⁴ *Id.*

³⁵⁵ Enyedi, *supra* note 270, at 1071.

general reallocation of significantly less funds for academic research institutions threatens institutional closures in the near future.³⁵⁶ Fidesz leveraged the Corona Bill to forcibly transfer control over the University of Theater and Film Arts (SZFE) to a private foundation, prompting students to occupy campus buildings, professors to resign, and tens of thousands to protest in Budapest.³⁵⁷ The battle for academic freedom in Hungary has manifested itself as a culture war between the nationalistic illiberal democracy and the liberal intelligentsia.

At the same time that the Orbán government refused to acknowledge Central European University's compliance with Lex CEU, Prime Minister Orbán signed a decree revoking accreditation and funding for gender studies departments, effectively banning the discipline.³⁵⁸ This decree only targets programs from two universities in Hungary: Central European University and Eötvös Loránd University.³⁵⁹ Effective immediately, the accreditation of all gender studies programs has been revoked, although the government is allowing currently enrolled students to finish their programs. Anti-intellectual and misogynistic rhetoric surrounding the gender studies ban date back to Fidesz's seizure of power. In 2015, László Kövér, one of the founders of Fidesz, stated:

We don't want the gender craziness. We don't want to make Hungary a futureless society of man-hating women, and feminine men living in dread of women, and considering families and children only as barriers to self-fulfillment ... And we would like if our daughters would consider, as the

³⁵⁶ Szabó András Péter, *Greetings from the Sinking Boat of Hungarian Academia*, INDEX (trans. Zoltán Kovács, Feb. 8, 2019), https://index.hu/english/2019/02/08/greetings_from_the_sinking_boat_of_hungarian_academia/.

³⁵⁷ See *supra* Part II.F (discussing the Corona Bill and Hungarian states of emergency). SZFE is a prestigious 155-year-old university that has educated prominent Hungarian artists. In March, the Fidesz government passed the Corona Bill, which included a provision "that transferred ownership of the public university to a private foundation. The government also appointed a new board of trustees—actions that raised fears that the university, long a target of the government, will be forced to hew more closely to Mr. Orbán's nationalistic and conservative vision for Hungary." Benjamin Novak, *Student Blockade Protests Viktor Orbán's Reach at a Top Arts University*, N.Y. TIMES (Sept. 6, 2020), <https://www.nytimes.com/2020/09/06/world/europe/hungary-students-blockade-orban.html>. At the time of writing, the students have refused to end their occupation "until [they] are guaranteed the university's autonomy." *Hungarian Students, Artists Protest Government's Takeover of Famed Film School*, RADIO FREE EUR./RADIO LIBERTY'S HUNGARIAN SERV. (Oct. 19, 2020), <https://www.rferl.org/a/hungarian-students-artists-protest-government-s-takeover-of-famed-film-school/30901261.html> (internal quotations omitted).

³⁵⁸ Anna Zsubori, *Gender Studies Banned at University—the Hungarian Government's Latest Attack on Equality*, CONVERSATION (Oct. 9, 2018), <http://theconversation.com/gender-studies-banned-at-university-the-hungarian-governments-latest-attack-on-equality-103150>.

³⁵⁹ *Id.*

highest quality of self-fulfillment, the possibility of giving birth to our grandchildren.³⁶⁰

Kövér went even further earlier that year to argue that “‘genderism’ is ‘an intellectual founding of such a human experiment that is nothing better than, let’s say, eugenics in Nazi times.’”³⁶¹ It is obvious that the government’s decision to ban certain academic fields—and compare them to Nazism—stems not from a genuine desire to improve the academic endeavors of universities but to control freedom of thought based on political ideology. Nationalist populist movements tend to yearn for a return to “traditional” society and reject modernism, and as such, embrace “traditional” gender roles.³⁶² Hungary is a very patriarchal country invested in traditional family structures,³⁶³ and Fidesz’s politics “signals opposition to the moral-cultural transformation of developed societies.”³⁶⁴ The gender studies ban is emblematic of the culture war between the Fidesz government and Central European University. The ban primarily affects Central European University, an institution that is one of the most diverse universities in the world³⁶⁵ and embodies the spirit of open society, multiculturalism, and cosmopolitanism. Accordingly, the ban, and its targeting of CEU, functions as the Fidesz government’s rebuke of the moral decline³⁶⁶ of the West. Academic institutions in other illiberal democracies have experienced similar treatment, especially with regard to teaching gender studies and other related subjects.³⁶⁷ This war on academia

³⁶⁰ *Id.* (alteration in original).

³⁶¹ *Id.*

³⁶² See Joane Nagel, *Masculinity and Nationalism: Gender and Sexuality in the Making of Nations*, 21 *ETHNIC & RACIAL STUD.* 242, 251–53 (1998) (discussing the distinct roles that men and women tend to play in nationalist narratives).

³⁶³ See *Religious Belief and National Belonging in Central and Eastern Europe*, PEW RES. CTR. (May 10, 2017), <https://www.pewforum.org/2017/05/10/social-views-and-morality/> (finding that Hungarians tend to hold conservative views on LGBTQ+ and gender issues: 54 percent believe that homosexuality should not be accepted by society, 27 percent favor same sex marriage, and 77 percent believe that women have a social responsibility to bear children).

³⁶⁴ Enyedi, *supra* note 270, at 1069.

³⁶⁵ *CEU Named #2 Most International University in the World by THE*, CENT. EUR. U. (Apr. 27, 2017), <https://www.ceu.edu/article/2017-04-27/ceu-named-2-most-international-university-world>.

³⁶⁶ See Orbán, *supra* note 282 (“[I]n liberal Europe being European means nothing at all: it has no direction, and it is simply form devoid of content.”).

³⁶⁷ In Russia, the European University at St. Petersburg lost its license to teach for two years due to an administrative ruling that began with a complaint by MP Vitaly Milonov, who was the key author of the homophobic 2013 “gay propaganda” bill. Milonov said of the university: “[An alleged student complaint] was the teaching of gender studies at the school. I personally find that disgusting, it’s fake studies, and it may well be illegal.” Fred Weir, *Why Is Someone Trying to Shutter one of Russia’s Top Private Universities?*, CHRISTIAN SCI. MONITOR (Mar. 28, 2017), <https://www.csmonitor.com/World/Europe/2017/0328/Why-is-someone-trying-to-shutter-one-of-Russia-s-top-private-universities>. In Turkey, at least 146 academics face individual and separate trial hearings for signing a 2016 petition condemning Turkey’s treatment of Kurds on the southeastern border and calling to resume peace talks with the Kurdistan Workers’ Party. This petition was initially signed by a group of 1128 academics

is not only ideological, but wrapped up in the very legal institutions of Hungary. Further, Lex CEU flies in the face of the Hungarian Constitution, which purports to protect academic freedom from government intrusion, and is a reminder of the hollowness of democratic institutions in illiberal democracies.³⁶⁸

Orbán and Fidesz's attacks on Central European University exemplify illiberal democratic principles in action. As has been demonstrated, the majoritarian Fidesz partocracy quickly seized control of all government organs, including purportedly independent ones, in order to bypass all opposition checks in every stage of the democratic process. Fidesz's reach has extended beyond democratic institutions to control virtually all mainstream media and restrict the operation of civil society to further insulate the régime from opposition.³⁶⁹ In addition to manipulating the law, they are controlling societal norms to produce the Magyar fictive ethnicity and suppress non-conservative discourse.³⁷⁰ At the same time, Hungarian history is actively being rewritten in a manner that glorifies past fascist leaders and stokes anger over the perceived injustices of the Treaty of Trianon.³⁷¹ Orbán invokes principles of absolute sovereignty when he

known as Academics for Peace. A number of these signatories are facing between one and five years' imprisonment for "spreading terrorist propaganda." Over 360 academics have been fired from their jobs and barred from teaching. *Turkey: Academics on Trial for Signing Petition*, HUM. RTS. WATCH (Dec. 5, 2017, 12:00 AM), <https://www.hrw.org/news/2017/12/05/turkey-academics-trial-signing-petition>. On January 24, 2019, Professor Yonca Demir of Bilgi University was sentenced to three years imprisonment, the longest prison sentence to date for members of Academics for Peace. John K. Wilson, *Turkey's Ongoing Attack on Academic Freedom*, ACADEME BLOG (Jan. 24, 2019), <https://academeblog.org/2019/01/24/turkeys-ongoing-attack-on-academic-freedom/>. In Brazil, President Jair Bolsonaro has "dismantl[ed] the Education Ministry, threaten[ed] to send the military to take over public schools, and publish[ed] stringent new textbook guidelines. . . . Bolsonaro has made ridding the Brazilian education system of 'Marxist rubbish' one of his administration's top priorities, with students being encouraged to report on teachers who attempt to 'indoctrinate' them." Bolsonaro's new Education Minister, Ricardo Vélez Rodríguez, swore in his inauguration speech to fight the "aggressive promotion of gender ideology." Schwartzburg, *supra* note 338. The Thai junta has detained American academics and maintains a watchlist of academics and researchers. Suluck Lamubol, *Junta Steps Up Harassment of International Academics*, U. WORLD NEWS (Mar. 1, 2019), <https://www.universityworldnews.com/post.php?story=20190301083420506>. In Egypt, Alexandria University has required that thesis proposals for masters and doctoral students adhere to the government's incomplete Vision 2030 development plan. Ashraf Khaled, *Concern Over Freedoms as University Curbs Thesis Topics*, U. WORLD NEWS (Dec. 5, 2018), <https://www.universityworldnews.com/post.php?story=20181205120855294>.

³⁶⁸ "Article X: (1) Hungary shall ensure the freedom of scientific research and artistic creation, the freedom of learning for the acquisition of the highest possible level of knowledge and, within the framework laid down in an Act, the *freedom of teaching*. . . . (3) Hungary shall protect the scientific and artistic freedom of the Hungarian Academy of Sciences and the Hungarian Academy of Arts. *Higher education institutions shall be autonomous in terms of the content and the methods of research and teaching*; their organization shall be regulated by an Act." HUNGARIAN CONSTITUTION, *supra* note 259 (emphasis added).

³⁶⁹ See *supra* notes 260–70 and accompanying text.

³⁷⁰ See *supra* notes 278–82 and accompanying text.

³⁷¹ See *supra* notes 290–92 and accompanying text.

treats Central European University as yet another invasion of the West and its “degenerate” ideology and paints Hungary as a nation that is still being constantly invaded, this time by liberals under George Soros’s watch.³⁷² Orbán has also deployed the “dictatorship of law” when passing Lex CEU as a direct assault on the “elite intelligentsia” that, through critical discourse and academia, threaten the legitimacy of the illiberal democracy.³⁷³ Far-right nationalist and anti-intellectual rhetoric characterizes Central European University and its intellectuals as a danger to “the people” of Hungary, pitting them against each other in a culture war that CEU did not sign up for.

While the situation in Hungary is grim, action can be taken. Individuals can continue to protest Fidesz’s régime and draw international attention to Hungary. Right now, “activists on the ground are setting up underground education lectures and organizing queer theory readings and poetry nights in people’s living rooms and basement bars.”³⁷⁴ Independent media and the academic community can further support democracy and academic freedom by publicizing the situation in Hungary and supporting communities and individuals under threat. Likewise, the international community can pressure illiberal democracies through diplomatic measures. Political and economic unions such as the European Union can adopt measures condemning the actions of illiberal democratic states and impose sanctions on noncompliant governments. On September 12, 2018, the European Union voted to pursue disciplinary action against Hungary under Article 7 of the European Union Charter. This is the first time that the EU has pursued action invoking Article 7, which lays out the ways that EU bodies can act if a member state violates the core values of the European Union.³⁷⁵ On March 20, 2019, the European People’s Party³⁷⁶ suspended Fidesz from the party in response to their campaign attacking Soros and European Commission President Jean-Claude Juncker, as well as its actions against Central European University. EPP President Joseph Daul stated: “We cannot compromise on democracy, rule of law, freedom of press, academic freedom or minorities’ rights. And anti-EU rhetoric is

³⁷² See *supra* notes 278–82, 349–54 and accompanying text.

³⁷³ See *supra* Part III.B.

³⁷⁴ Rosa Schwartzburg, *I’m a Gender Studies Student in Hungary & Americans Need to Know What’s Happening Here*, BUSTLE (Jan. 7, 2018), <https://www.bustle.com/p/im-a-gender-studies-student-in-hungary-americans-need-to-know-whats-happening-here-15574938>.

³⁷⁵ Maïa de la Baume & Ryan Heath, *Parliament Denounces Hungary’s Illiberalism*, POLITICO, <https://www.politico.eu/article/european-parliament-approves-hungary-censure-motion/> (last updated Apr. 19, 2019, 1:39 AM).

³⁷⁶ The European People’s Party is a center-right transnational organization founded by Christian democratic parties in Europe. The EPP is currently the largest party in the European Parliament, the European Council, and the European Commission. *History*, EUR. PEOPLE’S PARTY, <https://www.epp.eu/about-us/history/> (accessed Mar. 23, 2019).

unacceptable. The divergences between EPP and Fidesz must cease.³⁷⁷ Fidesz must end the anti-Junker and Soros campaign, solve the legal dispute over Central European University, and “recognize the damage it caused and refrain from similar action”³⁷⁸ in order to regain full membership to the EPP. As a result from pressure by the EPP, on March 20, Orbán and Prime Minister Söder of Bavaria exchanged letters supporting a partnership between CEU and the Technical University of Munich on the condition that CEU be allowed to remain in Budapest.³⁷⁹ At the time of writing, Orbán has yet to give CEU a legal guarantee to remain in operation and “an international agreement guaranteeing the freedom of CEU to operate in Budapest as a US degree granting institution”³⁸⁰ is needed before celebration. If Central European University is ultimately successful, it will be a testament to the sway of influence that European institutions still hold over this illiberal democracy. Even if Central European University is allowed to remain in Budapest, Hungary’s democratic institutions are still under siege and many other liberties enshrined under constitutional liberalism are still threatened.

CONCLUSION

We are currently in the throes of Huntington’s third reverse wave. After decades of democratic prosperity, global democracy has entered a “decade of decline.”³⁸¹ Between 2006 and 2016, Freedom House’s *Freedom in the World* report discovered that 105 countries suffered net declines in their scores, while 61 demonstrated improvement. Given these grim statistics, we have undoubtedly entered Huntington’s third reverse wave. Based on the first and second reverse waves, Huntington concluded that each reverse wave will give rise to a new form of authoritarianism. Illiberal democracy is that form of authoritarianism.

Illiberal democracy differs from other forms of authoritarianism due to the fact that some semblance of a democratic system remains. In many cases, the authoritarian government comes to power through the democratic process. However, once elected, they quickly consolidate control, and greatly weaken democracy and the safeguards of civil liberties

³⁷⁷ Maïa De La Baume & Lili Bayer, *Hungary’s Orbán Clings on to Europe’s Power Center*, POLITICO (Mar. 20, 2019), <https://www.politico.eu/article/orbans-party-suspended-from-european-peoples-party/>.

³⁷⁸ *Id.*

³⁷⁹ *CEU Needs Legal Guarantees If the Bavarian Solution Is to Work*, CENT. EUR. U. (Mar. 20, 2019), <https://www.ceu.edu/article/2019-03-20/ceu-needs-legal-guarantees-if-bavarian-solution-work>.

³⁸⁰ *Id.*

³⁸¹ See PUDDINGTON, *supra* note 74, at 5 (“According to *Freedom in the World*, the crucial indicators of democracy experienced setbacks in each of the 10 years in question. In all, 105 countries suffered net declines, while 61 showed some measures of improvement. The decade marked the longest democratic slump of its kind in more than 40 years of Freedom House analysis.”).

as guaranteed by constitutional liberalism. These régimes tend to value majoritarianism, absolute sovereignty, and the dictatorship of law while embracing nationalism and anti-intellectualism. When illiberal democracies operate under these values that run counter to the very nature of democracy, their democratic institutions become hollow and operate in name only. At the same time, illiberal democracies fail to protect the individual with liberties typically ascribed to constitutional liberalism and instead value the perceived needs of the community. This definition of community, however, is guided by nationalism. Illiberal democratic leaders determine which citizens are worthy of belonging to their imagined community—and thus the nation-state—through fictive ethnicity and national mythologies. For populist leaders like Orbán, “elite” intellectuals, non-ethnic Magyars, and the opposition are not welcome. Intellectuals pose a specific threat to authoritarians because critical discourse threatens to destabilize their régimes. Taken together, we can begin to recognize the warning signs of an illiberal democracy.

Huntington’s second generalization is particularly interesting as applied to Hungary’s illiberal democracy and is worth expanding. Huntington contends that transitions from democracy to authoritarianism tend to take place either through a military *coup d’état* or through an executive coup whereby a head of government concentrates power in the executive by declaring a state of emergency or instituting martial law. As opposed to concentrating power on an individual executive, Hungary’s partocracy has concentrated Fidesz’s power. Fidesz controls all three branches of government, independent government institutions, and the media, and while strangling civil society and academia. And, not a single action Fidesz has taken has been illegal under national law. Therefore, Huntington’s second generalization should be expanded to include the centralization of power by a group or party.

Finally, the large majority of Huntington’s factors under the first generalization have manifested themselves in Hungarian illiberal democracy. During the period of democratic transition, political scandals, majoritarianism, and partocracy weakened public regard for democratic values. Instability was intensified during this period due to the numerous economic crises experienced during Hungary’s transition to capitalism and in the 2008 economic recession. Third, the country is politically polarized, in part due to partocracy, the failures of MSZP, and Orbán’s inflammatory rhetoric. Fourth, MSZP’s missteps pushing through austerity measures and other initiatives that were unpopular with the general public fueled populist desires. Fifth, the use of law and order rhetoric, first with regard to the Roma and then the refugee crisis, has sparked ethno-nationalist sentiments and moved racist discourse into the political mainstream. Sixth, Hungary’s long history of occupation by nondemocratic régimes and the dramatic loss of territory resulting from the Treaty of Trianon, strengthened calls for

absolute sovereignty. Now, Fidesz has identified the European Union, “Western values,” and George Soros as the next invaders. Finally, the illiberal democratic régime has snowballed and propagated itself both in neighboring nation-states and internationally.

Hungary’s polarized political condition is exemplified in the clash between Orbán and Central European University. This clash pits Central European University—a symbol of Western liberalism and cosmopolitanism—against Orbán’s ethno-nationalist illiberal democracy. Other attacks on academic freedom, like the gender studies ban, slashed funding for research institutions, and campaigns against the Hungarian intelligentsia, demonstrate the serious threat that is posed to not only academic freedom in Hungary, but also academic freedom globally as illiberal democracies spread. There is some hope, however. Central European University’s ousting caught international attention, prompting criticism and solidarity from individuals, academia, powerful politicians, and government institutions. Orbán experienced severe backlash from the European Union for his actions—facing Article 7 disciplinary proceedings—as well as from the conservative European People’s Party that suspended Fidesz from the party. The European People’s Party’s actions even went so far as to prompt a dialogue between Orbán and EPP leaders that may result in the university being permitted to stay in Budapest and remain U.S. accredited.

For some reason, academic freedom in Hungary has received immense international attention that has been critical in CEU’s fight to exist in Hungary. Perhaps academia is more alluring than amendments to parliamentary procedure or executive power. Perhaps the international community still holds high regard for universities. Or perhaps people have rallied around Central European University for another reason. If CEU is successful, the outcome could provide us with a potential strategy to protecting academic freedom in Hungary and in other illiberal democracies, and even allow us to glean perspective on how illiberal democracies operate.